Supreme Court, U.S.
FILED

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No. 98-__ 98 445 SEP 14 1998

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In The

Supreme Court of the United States

October Term, 1997

HARRY C. BATCHELDER, JR., Individually and Derivatively on Behalf of HONDA MOTOR COMPANY, LTD. and AMERICAN HONDA MOTOR COMPANY, INC.,

Petitioner,

v.

NOBUHIKO KAWAMOTO, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

WILLIAM S. LERACH
MILBERG WEISS BERSHAD HYNES & LERACH LLP
600 West Broadway
Suite 1800
San Diego, CA 92101
Telephone: 619/231-1058

-and-

KEVIN P. RODDY
MILBERG WEISS BERSHAD HYNES & LERACH LLP
355 South Grand Avenue
Suite 4170
Los Angeles, CA 90071
Telephone: 213/617-9007

HENRY H. ROSSBACHER*
JAMES S. CAHILL
NANCI E. NISHIMURA
CLARA I. DURAN REED
ROSSBACHER & ASSOCIATES
445 South Figueroa Street
24th Floor
Los Angeles, CA 90071
Telephone: 213/895-6500

JONATHAN W. CUNEO
THE CUNEO LAW GROUP
317 Massachusetts Avenue, N.E.
Suite 300
Washington, D.C. 20002
Telephone: 202/789-3960

Attorneys for Petitioner

**Counsel of Record*

September 14, 1998

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OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Does an American investor who purchased American Depository Receipts on the New York Stock Exchange which were issued and listed by a foreign corporation to raise capital on the U.S. securities market, have standing to bring a shareholder derivative action on behalf of the foreign corporation and its wholly-owned, California subsidiary, where for decades the ADR holder has received proxy statements, exercised voting rights, and received dividends like all other shareholders in the foreign corporation?

2. Does a foreign corporation voluntarily waive the exemption available under SEC Rule 3a12-3(b), which provides that foreign private securities issuers need not file proxy statements, and subject itself to liability under §14(a) of the Securities and Exchange Act of 1934, which proscribes false and misleading proxy statements, where the foreign issuer contractually obligates itself to, and does, submit proxy materials to ADR holders in the United States but those materials are false and misleading?

3. Should federal courts extinguish a California state law right to bring derivative and double derivative claims on behalf of corporations that have sustained damages based upon the internal affairs doctrine of Japan, which Respondents maintain prohibits such claims?

PARTIES TO THE PROCEEDING

All parties do not appear in the caption of the case on the cover page of this Petition. A list of parties to the proceedings in the courts below is as follows: Yoshihide Munekuni, Hiroyuki Yoshino, Nobuyki Miyata, Koichi Amemiya, Masaki Iwai, Hiroyuki Shimojima, Takashi Matsuda, Koji Nagata, Takeshi Yamada, Tomohiko Nakano, Makoto Shino, Riku Iwai, Yoshino Okawara, Kazuo Ibuki, Tadashi Kume, Takeo Fukui, Ryuichi Tsukamoto, Katsuro Suzuki, Michiaki Shinkai, Michiyoshi Hagino, Shinya Iwakura, Isao Suzuki, Kazue Ito, Kunhiro Chujo, Kentaro Kato, Kaname Kasai, Kensuke Fukatsu, Takeo Matsumoto, Hirotada Komatsu, Yuji Sakasume, Motosatsu Shiraishi, Minoru Harada, Satoshi Aoki, Atsuyoshi Hyogo, Dennis Josleyn, Stanley James Cardiges, Gary D. Josleyn, David Pedersen, Roger Novelly, Robert A. Massitelli, Frederick W. Meis, Jr., Edward A. Temple, Thomas A. Caufield, Frank Pisano, Beatrice Sikora, James Short, John W. Billmyer, Lyon & Lyon, and Roland Smoot.

Nominal defendant American Honda Motor Company, Inc. and defendants Takeshi Yamada, Takeo Fukui, Koichi Amemiya, Isao Suzuki, Lyon & Lyon, and Roland Smoot were parties before the Ninth Circuit Court of Appeals.

RULE 29.6 LISTING

Honda Motor Company, Ltd., a nominal defendant below, is the parent company of American Honda Motor Company, Inc., also a nominal defendant below, which has no subsidiaries or affiliates.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Harry C. Batchelder, Jr. ("Batchelder"), respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's Order and Amended Opinion dated July 15, 1998 is reported as *Batchelder v. Kawamoto*, 147 F.3d 915 (9th Cir. 1998), and is reproduced in Appendix A, App. 1a-20a. The decision of the district court dated September 24, 1996, which is unreported, is reproduced in Appendix B, App. 21a-23a.[1]

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on June 15, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following statutory provisions are reproduced in Appendix D, App. 91a-94a:

15 U.S.C. §78n(a)

Federal Rule of Civil Procedure 23.1

17 C.F.R. §240.3a12-3(a) & (b)

17 C.F.R. §240.3b-4(b) & (c)

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[1] Petitioner's Verified Shareholder Derivative Complaint ("Complaint"), filed in the district court on February 23, 1996, is reproduced in Appendix C, App. 24a-90a.

17 C.F.R. §240.14a-9
California Corporations Code §800(b)(1)
Article 267 of the Japanese Commercial Code

STATEMENT OF THE CASE

A. Introduction

This case involves the rights of American investors who purchase shares in foreign corporations which issue and sell American Depository Receipts ("ADRs") in U.S. securities markets, and whether investors can bring derivative actions when such corporations and their U.S.-based subsidiaries sustain multi-million dollar damages caused by the wrongdoing of their fiduciaries. This Court's decision on the issues presented in this Petition will have a significant impact on the rights of numerous U.S.-based shareholders and this country's securities markets, where *billions* of dollars worth of ADRs are traded each year.

Batchelder began purchasing ADRs issued by Honda Motor Co., Ltd. ("Honda") in 1974. At the time he filed suit, he owned 1,246 ADRs, each representing 10 shares of Honda stock. App. 3a (147 F.3d at 916), 29a.[2] Batchelder brought his shareholder derivative action on behalf of nominal defendants Honda, a Japanese corporation, and American Honda Motor Company ("American

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[2] On October 21, 1976, Batchelder, a New York resident, purchased 200 "American Shares" of Honda, each representing 10 shares of Honda stock and evidenced by ADRs, and which he has held continuously for more than 20 years. Batchelder acquired additional American Shares of Honda on May 13, 1977; March 29, 1979; November 18, 1980; and May 18, 1983, all of which he continues to hold. Batchelder owns a total of 1,246 American Shares of Honda, each representing 10 shares of Honda stock. App. 29a.

Honda"), Honda's wholly-owned subsidiary which imports, sells, markets, services, and distributes Honda products. American Honda is a California corporation and its principal place of business is located in Torrance, California. App. 3a (147 F.3d at 916), 25a, 29a-33a.

Batchelder's Complaint alleged shareholder derivative claims for mismanagement, waste of corporate assets, breach of duty, abuse of control, constructive fraud, and dissemination of Honda's false and misleading proxy statements for its June 1995 shareholders' meeting in violation of §14(a) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. §78n(a). App. 3a (147 F.3d at 917), 80a-89a. The derivative claims arise from the largest commercial bribery and kickback scheme in U.S. history and the resulting, separate multi-district litigation brought against Honda and American Honda by Honda automobile dealers (the "Dealer Litigation") and assigned by the Judicial Panel on Multidistrict Litigation to the District of Maryland. Batchelder's Complaint alleged shareholder derivative claims on behalf of Honda and American Honda against the Managing Directors, Representative Directors, and Directors of Honda and American Honda, 17 former executives of American Honda who pled (or were found) guilty of federal criminal charges of defrauding American Honda through the bribe and kickback scheme, as well as American Honda's former general counsel (Lyon & Lyon) and two of its partners (and American Honda directors), Roland Smoot and James Short, who assisted in covering up the fraudulent scheme for many years. App. 2a-3a (147 F.3d at 916-17), 29a-48a, 57a-80a.[3] This continuing scheme to

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[3] *See United States v. Josleyn*, 99 F.3d 1182, 1185 (1st Cir. 1996) (affirming convictions of two former American Honda executives "for conspiring to defraud [American Honda] by

cover up the bribe and kickback scheme was recently documented in two orders issued by Judge Motz in the Dealer Litigation stripping Honda, American Honda, and its former outside counsel of the attorney-client privilege under the crime-fraud exception. Reproduced in the Appendix are the March 24, 1998 Order of the Fourth Circuit Court of Appeals denying a stay of the district court's March 10, 1998 Order, as well as the district court's June 3, 1998 Order. App. 95a-126a.

This Petition asks this Court to review the decisions of the courts below, which held that Batchelder lacked standing to bring shareholder derivative claims based on the erroneous extraterritorial application of Japanese law. App. 1a-20a (147 F.3d at 916-23), 21a-23a. Batchelder has standing to bring his derivative action under U.S. law. His claims regarding American Honda's corporate governance and the fiduciary duties owed to it by its directors and outside legal counsel are governed by California law. While Japanese law provides the *substantive* law to adjudicate Honda's claims against its officers and directors, Japanese law does *not* determine Batchelder's *standing* to bring California state and federal law claims on behalf of Honda and American Honda. In reaching the opposite conclusion, the district court and Ninth Circuit were wrong as a matter of law.

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accepting money and other valuable consideration from prospective Honda dealers in exchange for lucrative dealership rights and sundry advantage"), *cert. denied*, ___ U.S. ___, 117 S. Ct. 959 (1997); *In re American Honda Motor Co., Inc. Dealerships Relationships Litig.*, 958 F. Supp. 1045, 1047-50 (D. Md. 1997) (detailing Honda dealers' allegations against Honda, American Honda, a number of dealers, current and former executives and American Honda's outside lawyers Lyon & Lyon, Roland Smoot and James Short).

Batchelder also asks this Court to confirm that ADRs are the equivalent of shares of a foreign corporation, that ADR holders are the same as shareholders, and that he has standing to pursue his derivative claims on behalf of Honda and American Honda in federal district court in California.

Batchelder further asks this Court to reverse the dismissal of his claim under §14(a) of the Exchange Act by holding that the disclosure exemption provided by Securities and Exchange Commission ("SEC") Rule 3a12-3(b), 17 C.F.R. §240.3a12-3(b), may be voluntarily waived by a private foreign securities issuer. Honda and its directors are not absolved from their duty to disseminate truthful and complete proxy materials when they voluntarily elected to do so in compliance with the express contractual promises made to ADR holders (like Batchelder) in Honda's Deposit Agreement and in its 1977 Listing Application to the New York Stock Exchange ("NYSE").

B. The Honda/American Honda Bribe and Kickback Scheme

From 1979 to 1992, Honda and American Honda were victims of the largest commercial bribery scheme in U.S. history, involving more than $15 million in bribes, kickbacks and payoffs paid to Honda and American Honda directors and high-ranking executives by Honda and Acura automobile dealers. App. 25a-26a. During this period, when American consumers routinely paid thousands of dollars above the dealer's sticker price for popular Honda and Acura automobiles, certain dealers gave these bribes in the form of expensive gifts and envelopes filled with cash to obtain preferential deliveries of scarce vehicles. Federal prosecutors have publicly stated that Honda and American Honda were the principal victims of this multi-million dollar scheme, a pronouncement

which has repeatedly been endorsed by Honda's spokespersons. App. 26a.

Following a two-year investigation, in 1994 U.S. prosecutors charged two dozen persons – including 18 former American Honda executives and two Honda dealers – with numerous criminal offenses, including mail fraud, racketeering, and conspiracy. Twenty-two persons subsequently pled guilty to federal charges and, in June 1995, defendants Dennis Josleyn and John W. Billmyer were found guilty. Allegations of the bribes and kickbacks were established during the criminal trials. App. 26a-27a.[4]

The results of the criminal prosecution led to the filing of several dozen civil lawsuits against Honda, American Honda, their directors and executives by Honda and Acura dealers. App. 27a; *see* note 3, *supra*. In the Dealer Litigation, Honda and American Honda have incurred millions of dollars in defense costs, in addition to the incalculable injury to their business reputation which has already been suffered. One dealer's lawsuit in New Hampshire was settled in 1994 when Honda and/or American Honda paid several million dollars. App. 27a-28a. On July 29, 1998, *The New York Times* reported that Honda had agreed to pay $316 million to settle the Dealer Litigation.[5]

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[4] Batchelder's Complaint alleges that defendants Koichi Amemiya and Yoshihide Munekuni, the highest ranking executives of American Honda (who continue to serve as Representatives Directors and Executive Vice President and/or Senior Managing Director of Honda and members of American Honda's Board of Directors), knowingly approved, supported, and/or affirmed the wrongful and illegal acts carried out by American Honda's executives. App. 34a-35a, 48a-52a, 72a-80a.

[5] Judge Motz, who presides over *In re American Honda Motor Co. Inc. Dealerships Relationships Litig.*, 941 F. Supp. 528 (D. Md. 1996), found:

C. Basis for Federal Jurisdiction Below

Batchelder's Complaint was filed in the Central District of California on February 23, 1996. App. 24a-90a. Over Batchelder's objections, the district court stayed all discovery pending defendants' anticipated motions to dismiss. App. 3a-4a (147 F.3d at 917). On September 24, 1996, the district court dismissed this action with prejudice. App. 4a (147 F.3d at 917), 21a-23a. Judge Lew held that as an ADR holder, Batchelder lacked standing to sue and could not assert shareholder derivative claims on behalf of Honda or American Honda under Japanese law, that the Japanese courts had exclusive jurisdiction over his claims, that doctrines of international comity and *forum non conveniens* precluded the district court from hearing the action, and that Honda could not be sued for violations of §14(a) of the Exchange Act. App. 4a (147 F.3d at 917), 22a-23a.

Batchelder timely appealed to the Ninth Circuit, which affirmed the district court's dismissal of his case. The appellate panel only addressed two of the numerous issues raised on appeal; namely, Batchelder's standing to sue and his false and misleading proxy claim under

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> [I]t was Honda Japan who chose to structure its management as it did, having its executives cross corporate lines with regular frequency. . . . [W]hen it has clothed the top level management of one of its subsidiaries [American Honda] with the appearance of parent-corporation authority, it can hardly ask those not within its inner circle to distinguish between the capacities in which its executives were acting when (as must be assumed to be the fact on a motion to dismiss) they participated in a widespread bribery scheme.

Id. at 553.

§14(a). App. 2a-20a (147 F.3d at 916-23). The Ninth Circuit held that Batchelder's right to bring derivative claims on behalf of Honda *and* American Honda is a question of *Japanese* law by virtue of a choice-of-law clause found in the ADR Deposit Agreement between Honda and Morgan Guaranty Trust Company of New York ("Morgan Guaranty"), as well as the "internal affairs" doctrine. App. 5a-13a (147 F.3d at 917-20). Relying on Respondents' experts, who had opined in the district court on the meaning of Article 267 of the Japanese Commercial Code ("Article 267"), the court of appeals stated that only shareholders whose names appear on Honda's "shareholders' register" may assert derivative claims and that Batchelder, as an ADR holder, is not a registered shareholder of record. App. 13a-16a (147 F.3d at 921-22).[6] The court also held that Honda is a "foreign private issuer" under SEC Rule 3a12-3(b) and is, therefore, exempt from the proxy requirements of §14(a), despite having voluntarily distributed proxy materials which Batchelder alleges were false and misleading. App. 16a-20a (147 F.3d at 922-23).

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[6] Significantly, the Ninth Circuit did *not* state whether or not Batchelder's name appears in Honda's "shareholders' register" because there was no proof in the record from which it could make such a finding. App. 14a (147 F.3d at 921). Similarly, because the district court stayed discovery, there was no proof in the record as to whether Morgan Guaranty, which issued the ADRs purchased by Batchelder, is listed in Honda's "shareholders' register." App. 3a, 14a (147 F.3d at 917, 921).

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS SIGNIFICANT ISSUES CONCERNING THE RIGHTS OF AMERICAN ADR HOLDERS AND THE CORPORATE GOVERNANCE REMEDIES THEY ARE ENTITLED TO.

This Petition should be granted because of the significant role that ADRs play in the U.S. securities markets and the now uncertain rights of ADR holders and their role in the corporate governance of numerous foreign companies doing business in the U.S. through domestic subsidiaries. ADR holder Batchelder is the same as a Honda shareholder and, under American *and* Japanese law, he has standing to bring a shareholder derivative action to remedy the wrongs suffered by the parent corporation (Honda) and its wholly-owned, California-based subsidiary (American Honda). ADR holders are not second-class corporate citizens; instead, they enjoy the same authority as common stockholders to remedy wrongs caused by corporate mismanagement. This important premise should be recognized by this Court in order to protect and preserve the confidence of American investors who purchase *billions* of dollars of ADRs traded each year on U.S. securities exchanges.

This Court should also grant certiorari to examine the Ninth Circuit's interpretation of SEC Rule 3a12-3(b)'s foreign private issuer exemption from the requirements of §14(a) of the Exchange Act regarding dissemination of proxy statements. This presents an important question of federal securities law that has not been, but should be, settled by this Court.

II. AMERICAN INVESTORS WHO PURCHASE ADRS ARE TREATED THE SAME AS SHAREHOLDERS OF THE FOREIGN CORPORATION WHO ISSUE THE ADR.

Foreign corporations create markets for their securities and raise *billions* of dollars in capital in the U.S. each year through the issuance of ADRs. *See* Mark A. Saunders, *American Depository Receipts: and Introduction to U.S. Capital Markets for Foreign Companies*, 17 Fordham Int'l L.J. 48, 49 (1993). Recent years have shown a steady growth in the number of foreign companies with ADR securities listed on U.S. securities exchanges. *See* Joseph Velli, *American Depository Receipts: An Overview*, 17 Fordham Int'l L.J. S38, S47-S50 (1994); *see also* Richard C. Breeden, *Foreign Companies and U.S. Securities Markets in a Time of Economic Transformation*, 17 Fordham Int'l L.J. S77, S85 (1994) ("Breeden, *Foreign Companies*") (discussing dramatic recent increase in non-U.S. companies registered with the SEC). Share and dollar trading volumes of ADRs on the U.S. securities exchanges (NYSE, AMEX, and NASDAQ) were approximately 3.5 *billion* shares valued at $135 *billion* for the first quarter of 1998 and approximately 3.5 *billion* shares valued at $140 *billion* for the second quarter of 1998. The Bank of New York, *Depository Receipt Quarterly Market Review*, 1st Quarter (March 31, 1998) & 2d Quarter (June 30, 1998).

Honda ADRs are freely traded in the U.S. securities markets and have been listed on the NYSE since approximately 1977. App. 32a. Honda's common stock, in the form of ADRs, is registered with the SEC pursuant to §12(a) of the Exchange Act, 15 U.S.C. §781(a). App. 32a. No one can seriously dispute that Honda is subject to the reporting and disclosure requirements of the federal securities laws. *See Itoba Ltd. v. LEP Group PLC*, 54 F.3d 118, 120 (2d Cir. 1995) (British issuer traded ADRs on

NASDAQ); *Newport Components v. NEC Home Electronics*, 671 F. Supp. 1525, 1540 (C.D. Cal. 1987) (same).

Honda induced U.S. investors, including Batchelder, to buy its ADRs, at least in part on the express representation that they could participate in corporate governance like a shareholder in any U.S. corporation, by issuing to ADR holders quarterly and annual reports, notices of shareholder meetings, and solicitations of their votes for the election of Honda directors. App. 32a-33a. For many years, Batchelder received shareholder dividends paid directly by Honda, as well as Honda's quarterly and annual reports and proxy solicitations. Batchelder voted directly for Honda's directors and personally cashed Honda's dividend checks. At all times, until he filed his derivative action, Batchelder was treated by Honda as a shareholder.

American investors do not (and increasingly cannot) distinguish between buying ADRs and directly purchasing the foreign issuer's common stock. *See Consolidated Gold Fields PLC v. Minerco, S.A.*, 871 F.2d 252, 255 (2d Cir. 1989); *Sears Roebuck & Co. v. Sears plc*, 744 F. Supp. 1297, 1300 (D. Del. 1990); *American Depository Receipts*, Securities Act of 1933, Exchange Act Release Nos. 33-6894, 34-29226, 1991 SEC LEXIS 936, at *4 (May 23, 1991). Whether American shareholders hold their ADRs in street name or directly, they have no reason to distinguish between domestic and foreign issuers. They receive financial reports, proxy statements, and dividend checks from the foreign issuers, as Batchelder did. They are not furnished with deposit agreements or any documentation limiting their rights.[7] By its practice and conduct over

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[7] In enforcing against Batchelder the choice-of-law clause contained in the Deposit Agreement between Honda and Morgan Guaranty, the Ninth Circuit panel sought to bring this

two decades, Honda led its ADR holders to expect equal treatment in terms of shareholder rights and benefits to those received by owners of U.S.-registered shares traded on U.S. securities exchanges.

The Ninth Circuit's opinion in this case permits foreign securities issuers to deny full shareholder status to their U.S. investors who hold ADRs when the management of the foreign corporations wish to avoid derivative actions, despite their concerted, longstanding efforts to persuade investors that ADR ownership in the foreign company is the equivalent of common stock ownership in a domestic securities issuer.

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case within the holding of *Richards v. Lloyd's of London*, 135 F.3d 1289 (9th Cir. 1998) (en banc), *petition for cert. filed* (May 4, 1998), which enforced choice-of-forum and choice-of-law provisions calling for application of English law in General Undertaking agreements signed by "American Names" who invested in Lloyd's syndicates. *See* App. 8a-9a (147 F.3d at 919). The *Richards* court, however, based its holding on the fact that the "American Names" traveled to London and reviewed the undertaking agreements before signing them:

> To become a Name, one must travel to England to acknowledge the attendant risks of participating in a syndicate and sign a General Undertaking. . . . The Names signed a contract with English entities to participate in an English insurance market and flew to England to consummate the transaction.

135 F.3d at 1292, 1294. No such facts are present in this case: the Deposit Agreement between Honda and Morgan Guaranty was never shown to Batchelder, and he certainly never signed it, either in the U.S. *or* in Japan.

III. BATCHELDER'S STANDING TO BRING THE DERIVATIVE CLAIMS IS SUPPORTED, NOT DEFEATED, BY THE DEPOSIT AGREEMENT.

The Ninth Circuit incorrectly employed the choice-of-law clause contained in Honda's Deposit Agreement with Morgan Guaranty to define the status of ADR holders in a manner that is inconsistent with the way ADRs have long been used and interpreted by foreign securities issuers (like Honda) and by investors in the U.S. securities markets (like Batchelder), and contrary to the overall text of Honda's Deposit Agreement.[8] Having concluded that Japanese law alone determines whether an ADR holder is a shareholder entitled to bring a derivative action, the Ninth Circuit panel was persuaded by the advocacy of Respondents' Japanese law experts (who were never subject to cross-examination because the district court stayed discovery) to narrowly construe Article

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[8] Section 7.07 of the Deposit Agreement, entitled "Governing Law," states:

> This Deposit Agreement and the Receipts and all rights hereunder and thereunder and provisions hereof and thereof shall be governed by and construed in accordance with the laws of the State of New York, United States of America. It is understood that notwithstanding any present or future provision of the laws of the State of New York, the rights and holders of Stock and other Deposited Securities, and the duties and obligations of the Company in respect of such holders, as such, shall be governed by the laws of Japan.

This choice-of-law clause appears in the Deposit Agreement, which Batchelder never received but upon which the Ninth Circuit pinned its analysis, *see* App. 5a-11a (147 F.3d at 917-20), and note 7, *supra*, but it does *not* appear on the face of Honda's ADR certificates.

267 and to disqualify Batchelder as a registered shareholder of record. App. 13a-16a (147 F.3d at 921-22).

The Deposit Agreement expressly recognizes that ADRs are the equivalent of Honda's common stock. It constitutes a contract between the issuer (Honda) and the depository (Morgan Guaranty) and outlines their rights and responsibilities. *See American Depository Receipts*, 1991 SEC LEXIS 936, at *10-11 n.63; *cf.* App. 9a (147 F.3d at 919). Under the terms of the Deposit Agreement, Honda agreed to deposit its common stock (par value 50 yen per share) with its designated depository, Morgan Guaranty, or with the custodian, Mitsubishi Bank Limited in Tokyo, in order to issue ADRs with respect to the shares of Common Stock so deposited. Section 2.05 of the Deposit Agreement allows Batchelder, upon demand, to exchange his ADRs for the deposited shares in Honda stock. In turn, §2.07(c) provides that upon surrender of the ADRs at the corporate office of the depository, the holder (Batchelder) is entitled to immediately withdraw the Honda stock evidenced by the ADRs.

The Ninth Circuit panel refused to acknowledge the ADRs' status as negotiable receipts evidencing Batchelder's ownership of a specified number of shares of Honda common stock which are deposited with the depository. *See* 3 Thomas Lee Hazen, *The Law of Securities Regulation*, §14.2, at 69 (3d ed. 1995).[9] The SEC recognizes this equivalency. *See American Depository Receipts*, 1991

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[9] A depository share is defined as "a security, evidenced by an [ADR], that represents a foreign security or a multiple of or fraction thereof deposited with a depository." 17 C.F.R. §230.405 (1998). *See also* Vickie Kokkalenios, Note, *Increasing United States Investment in Foreign Securities: An Evaluation of SEC Rule 144A*, 60 Fordham L. Rev. 179, 188 n.66 (1992) ("ADRs are certificates representing ownership of foreign securities.") (citing *American Depository Receipts*, 56 Fed. Reg. 24,420, 24,421 & n.5 (1991)).

SEC LEXIS 936, at *3-4 ("An ADR represents an ownership interest in a specified number of securities that have been deposited with a depository by the holder of such securities"). Thus, to reason that Batchelder (or any other ADR holder) is not a shareholder of the foreign securities issuer is akin to arguing that a passbook holder is not the owner of his or her own funds, but that is exactly what the Ninth Circuit held.

Under the Deposit Agreement, the depository (Morgan Guaranty) ensures that the ADR holder will be treated fairly regarding stock dividends and splits, disclosures, and other shareholder rights. Honda requires and pays for the depository to maintain a register of ADR holders and to furnish a list of these owners to Honda. Honda has established a mechanism for tracking and treating ADR holders on the same basis as its "registered" shareholders. This is logical because ADR holders may at any time exchange their ADRs for Honda common stock.[10] Ironically, in order for the selection of Japanese law found in the second sentence of the choice-of-law provision (§7.07) of Honda's Deposit Agreement to apply in this case, Honda must concede that ADR holder Batchelder is a "holder[ ] of [Honda] Stock and other Deposited Securities." *See* note 8, *supra*. However, the

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[10] It is Petitioner's understanding that Honda's Deposit Agreement, its ADR certificates, and its tracking of ADR holders are typical of the practice of other foreign issuers trading sponsored ADRs through U.S. exchanges. The issues presented this case regarding the use and general operation of ADRs in the U.S. securities markets further justifies this Court's review. *See United Steel Workers of America v. Usery*, 429 U.S. 305, 307 n.3 (1977) (certiorari granted where statutory propriety of provision in union constitution was issue which was similar to provisions in other union constitutions).

Ninth Circuit panel misconstrued the clear meaning of this provision. App. 5a-11a (147 F.3d at 917-20).

The Ninth Circuit also refused to acknowledge the fact that Honda does not differentiate between its ADR holders and its "registered" shareholders. By virtue of an April 19, 1995 amendment to the Deposit Agreement, Honda requires any shareholder with a *beneficial* ownership of greater than 5% to report this to the company. "Beneficial Owner" is defined to *include* a holder of ADRs and counts the shares into which the ADRs may be converted as being part of the number of shares used to determine that 5% ownership threshold. Of course, it has long been recognized that a beneficial owner of stock may bring a shareholder derivative action under federal or California law.[11]

Even if Japanese law may govern Batchelder's standing to assert derivative claims on behalf of Honda – which Batchelder contests[12] – Batchelder is a Honda

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[11] *See DeHaas v. Empire Petroleum Co.*, 435 F.2d 1223, 1227-28 (10th Cir. 1970) (regarding plaintiff under merger agreement with right to demand issuance of stock in corporation, but who did not do so, as practical equivalent of record stockholder with standing to bring derivative suit); *Norton v. National Research Foundation*, 141 F.R.D. 510, 512 (D. Kan. 1992) (plaintiffs, who were not shareholders of record and who had not yet received shares under California and Kansas probate law, had standing to maintain shareholder derivative suit under state law); 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil 2d* §1826, at 45-46 (1986) ("[R]elying on state law, federal courts have been able to adjudicate derivative suits not only when they are brought by shareholders of record but by unregistered shareholders and beneficial owners as well"); Fed. R. Civ. P. 23.1; Cal. Corp. Code §800(b)(1).

[12] Batchelder contends that Japan provides the *substantive* law to adjudicate Honda's claims against its directors and officers. Under Cal. Corp. Code §2116, the California courts

shareholder. The Japanese shareholder derivative action statute (Article 267) is virtually identical to, and is derived from antecedents to, Rule 23.1 of the Federal Rules of Civil Procedure. Although the Japanese Commercial Code (Shoho) is based generally on the German model, "the specific provisions regarding derivative actions were introduced by U.S. occupation authorities in 1950" and "[t]hese legal reformers explicitly model the Japanese system after its American counterpart." Mark D. West, *The Pricing of Shareholder Derivative Actions in Japan and the United States*, 88 Nw. U.L. Rev. 1436, 1439 (1994). Like Rule 23.1 and Cal. Corp. Code §800(b)(1), Article 267(1) confers derivative standing on "[a]ny shareholder." App. 94a. Thus, the standing analysis properly employed under federal law and California law supports an ADR holder's right to sue under Japanese law as well.

Moreover, §7.07 of the Deposit Agreement is not a dragnet choice-of-law provision. *See Jacobson v. Mailboxes Etc. U.S.A. Inc.*, 646 N.E.2d 741, 744-45 (Mass. 1995) (court applied California law in concluding that reach of forum selection clause was limited and did not apply to all wrongs alleged). Section 7.07's scope cannot be expanded extraterritorially to encompass duties and obligations owed by Respondents which are governed by California law. For example, the Deposit Agreement says nothing about the Lyon & Lyon law firm's duties to American Honda, which are governed by California law because American Honda (the client) is a California corporation

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have jurisdiction to enforce Honda's claims for violations of Japanese law. However, Japanese law does *not* control Batchelder's *standing* to bring California state law and federal claims on behalf of Honda *and* American Honda in California. Rule 23.1 and/or Cal. Corp. Code §800(b)(1) furnish the standing requirements for such claims.

and Lyon & Lyon (its former outside counsel) is a California law firm; its partners – former American Honda directors Roland Smoot and James Short – are California attorneys. App. 29a-48a, 72a-80a. Thus, §7.07 should not have been applied by the Ninth Circuit because it could not be invoked by anyone who is not a party to the Deposit Agreement.

IV. THE CHOICE-OF-LAW CLAUSE IN THE DEPOSIT AGREEMENT IS UNREASONABLE AND UNENFORCEABLE UNDER CALIFORNIA LAW AND PUBLIC POLICY WHICH ALLOW BATCHELDER TO BRING HIS DERIVATIVE CLAIMS IN CALIFORNIA.

There is no dispute that forum selection and choice-of-law clauses are enforceable in certain cases. *See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537-39 (1995); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519-20 (1974); *see also Nedlloyd Lines B.V. v. Superior Court*, 834 P.2d 1148, 1150-51 (Cal. 1992). Such clauses, even if they apply non-American law, may be enforced in the interest of international comity. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), however, this Court enforced an agreement to arbitrate *only* after it was satisfied that U.S. law would be applied to the subject antitrust claims in the arbitration proceedings, observing that "in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy." *Id.* at 637 n.19; *see also Vimar Seguros*, 515 U.S. at 540.

To the general rule, therefore, this Court recognizes an important caveat: "A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought." *Bremen*, 407 U.S. at 15; *see also Pacific Employers Ins. Co. v. Industrial Accident Commission*, 306 U.S. 493, 501 (1939); *Alaska Packers Association v. Industrial Accident Commission*, 294 U.S. 532, 543 (1935). Likewise, under applicable California conflict-of-law rules, a court should reject the law designated by a contractual provision if its application runs contrary to a California public policy or evades a California statute. *See Nedlloyd*, 834 P.2d at 1152; *accord Marine Midland Bank, N.A. v. United Missouri Bank, N.A.*, 643 N.Y.S. 2d 528, 531 (N.Y. App. Div. 1996) (discussing similar New York choice-of-law principles).[13]

In this case, the Ninth Circuit disregarded the law of California, which recognizes important public policies underlying a derivative action wherein damages are sought for the benefit of a corporation that has been injured, which may not otherwise be redressed because of the failure of the corporation to act. App. 53a-57a (Batchelder's demand futility allegations); *see Jones v. H.F. Ahmanson & Co.*, 460 P.2d 464 (Cal. 1969). The derivative action provisions of Cal. Corp. Code §800(b)(1) apply to suits brought on behalf of *any* domestic *or* foreign corporation by "a shareholder, of record or beneficially, or the holder of voting trust certificates." App. 91a. Double derivative suits, which are brought to remedy wrongs directly incurred by the parent corporation, as well as

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[13] Under the first sentence of §7.07, the Deposit Agreement itself, including the choice-of-law clause, is governed by and construed according to New York law. App. 5a-6a & n.2 (147 F.3d at 917-18 & n.2).

those indirectly incurred because of wrongs suffered by its subsidiary, are allowed in California. *See Federal Deposit Insurance Corp. v. Alshuler (In re Imperial Corp. of America)*, 92 F.3d 1503, 1510 n.10 (9th Cir. 1996); *Gaillard v. Natomas Co.*, 219 Cal. Rptr. 74, 79-80 n.7 (Cal. Ct. App. 1985).[14] Clearly Batchelder has a direct, statutory right to bring these claims in California and the Ninth Circuit ignored these important public policies in denying his standing to sue. App. 10a-11a (147 F.3d at 919-20).

Permitting the Ninth Circuit's draconian, contractual choice-of-law limitation to stand only serves Respondents' interests by shielding them from civil liability for violations of law committed in this country by claiming that ADR holders are not shareholders and, therefore, are not entitled to bring suit. Thus, the Ninth Circuit's decision in this case directly extinguishes rights under California and U.S. law.[15] Applying the choice-of-law provision in the Deposit Agreement, as argued by Respondents and interpreted by the Ninth Circuit, within the content of Article 267 is contrary to California and U.S. public policy intended to protect American investors.

Since 1979, the bribe and kickback scheme has caused hundreds of millions of dollars in damages to Honda and American Honda. Those damages consist, at a minimum,

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[14] On this point, the Ninth Circuit clearly misconstrued California authority. *See* App. 4a n.1, 11a (147 F.3d at 917 n.1, 920).

[15] In the courts below, Respondents cynically referred Batchelder to Japan to assert his claims, while admitting, as the district court ruled, App. 22a, that Batchelder had no double derivative claims under Japanese law against American Honda's directors and officers and Lyon & Lyon. In its rush to extinguish American shareholders' rights, the Ninth Circuit did not even discuss this point.

of the more than $300 million settlement that Honda/American Honda has agreed to pay its dealers, untold millions of dollars spent to defend the Dealer Litigation, and indisputable loss of business reputation and good will. App. 27a-28a, 60a. The scheme also corrupted the commercial life of this country. What public policy of the United States or of California immunizes the officers and directors of these corporations and their outside counsel from liability here?

American Honda's and Honda's claims against the Respondents who were the California subsidiary's officers, directors, and outside counsel, *see* App. 34a-36a, 38a, 40a-48a, are governed by California law and California has a legitimate interest in providing a forum to adjudicate Batchelder's derivative claims related to the operation and management of the California corporation, as well as Honda. The Ninth Circuit's decision is contrary to U.S. public policy and this Court's decisions in *Mitsubishi Motors, Bremen, Alaska Packers,* and *Pacific Employers,* which emphasized the importance of curtailing choice-of-law contractual provisions which leave a party without a legal remedy. *See generally* Darrell Hall, Note, *No Way Out: An Argument Against Permitting Parties to Opt Out of U.S. Securities Laws in International Transactions,* 97 Colum. L. Rev. 57 (1997).

V. THE INTERNAL AFFAIRS DOCTRINE DID NOT SUPPORT DISMISSAL OF THE DERIVATIVE CLAIMS STEMMING FROM THE NINTH CIRCUIT'S NARROW READING OF JAPANESE LAW.

Generally, when the liability of officers and directors for their stewardship of a corporation is at issue, the law of the place of incorporation applies. This conflict-of-law principle, known as the "internal affairs doctrine," has been recognized by this Court. *See CTS Corp. v. Dynamics*

Corp. of America, 481 U.S. 69, 89-93 (1987). Unlike the Ninth Circuit, however, this Court does not mechanically apply the principle. *Compare* App. 11a-12a (147 F.3d at 920) *with First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 621 (1983) (applying federal common law and international law principles, rather than Cuban law).

To determine whether to apply domestic or foreign law, one looks to international conflict-of-law, which is an issue of "comity."[16] Comity is defined as "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Cunard S.S. Co. v. Salen Reefer Services AB*, 773 F.2d 452, 456 (2d Cir. 1985) (quoting *Hilton v. Guyot*, 159 U.S. 113, 164 (1895)). In essence, comity, which applies to the respect provided by one nation to another, is analogous to the respect provided between states under the Full Faith and Credit Clause, Art. IV, §1, of the U.S. Constitution.

When applying the Full Faith and Credit Clause to a choice-of-law question, this Court has repeatedly held that a state is not required to apply the law of another state when to do so would be "contrary" or "obnoxious" to the public policy of the forum state. *Nevada v. Hall*, 440 U.S. 410, 422 (1979); *see also Bradford Electric Light Co. v.*

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[16] In the U.S., conflict-of-law is constitutional law. The U.S. courts view foreign law as a matter of comity and diplomacy originating from the voluntary choice of a sovereign power. "[I]nternational choice of law requires more flexibility than domestic choice of law" and "needs accessible escape hatches." Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum. L. Rev. 249, 259-61 (1992).

Clapper, 286 U.S. 145, 160 (1932); *Pacific Employers*, 306 U.S. at 503-504. The Ninth Circuit has also recognized this principle. *See Govett American Endeavor Fund, Ltd. v. Trueger*, 112 F.3d 1017, 1021 (9th Cir. 1997). Moreover, a state is *not* compelled to recognize the exclusive jurisdiction provisions of a sister state. *See Tennessee Coal, Iron & Railroad Co. v. George*, 233 U.S. 354, 359 (1914). In *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981), this Court stated that "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."

To properly balance the interests of California (the forum state) and Japan (where Honda is incorporated), the Ninth Circuit should have – but did not – take the following factors into account: The vast majority of relevant documentary and testimonial evidence is located in the U.S., not Japan; the bribe and kickback scheme took place in this country; those involved in the cover-up, including Lyon & Lyon, American Honda's California-based former outside counsel, are located in the U.S.; key witnesses in the Dealer Litigation are located in the U.S.; and American Honda has in its possession documentary evidence located in the U.S. App. 40a-48a, 57a-80a. Moreover, Batchelder cannot bring his derivative claim and he will be left without a remedy if, as the Ninth Circuit held, he is not considered a shareholder under of Japanese law.

Conversely, Respondents' contacts with Japan are limited to the fact that many of Honda's – but not American Honda's – directors are located there. App. 33a-40a. However, Batchelder can take their depositions and secure their testimony because Japan is a signatory to the Consular Convention. In this case, the contacts and interests of California are far superior to those of Japan, the

country of Honda's incorporation, *see Nevada*, 440 U.S. at 422; *Pacific Employers*, 308 U.S. at 503-504, but Respondents' true intent is to deter Batchelder and other ADR investors from pursuing their legal rights and remedies.

The Ninth Circuit mechanically held that Batchelder's standing derives solely from his relationship with Honda, which is incorporated in Japan, and held that the existence and scope of Batchelder's derivative claims on behalf of *both* Honda *and* American Honda are governed by Japanese law. App. 5a (147 F.3d at 917). The Ninth Circuit applied the "internal affairs" doctrine extraterritorially (outside of Japan) to support Respondents' interpretation of Article 267, and thereby defeat Batchelder's standing to sue in a California federal district court on behalf of Honda *and* American Honda for damages caused by violations of California law committed by American Honda's officers, directors and outside counsel, most of whom are California residents. *See* App. 40a-48a. This Court should grant certiorari to correct this arbitrary incongruity because the result is that the nation of incorporation of foreign securities issuers selling ADRs in the U.S. may completely foreclose our nation's courts from protecting U.S shareholders.

In its opinion, the Ninth Circuit dismissed the Delaware Supreme Court's persuasive decision in *Sternberg v. O'Neil*, 550 A.2d 1105 (Del. 1988). App. 12a-13a (147 F.3d at 920). While the principal issue presented in that case was personal jurisdiction, the Delaware court recognized that in a derivative action the internal affairs doctrine, when *properly* construed, mandates application of the law of the state of the parent company's incorporation *only* to the internal affairs of the parent, while the law of the state of incorporation of its wholly-owned subsidiary applies to the internal affairs of that subsidiary. *Sternberg*, 550 A.2d at 1123-24.

In *Sternberg*, a derivative suit was brought on behalf of GenCorp, an Ohio corporation, and its wholly-owned subsidiary, RKO General, a Delaware corporation, against past and present officers and directors of both corporations for damage sustained by RKO General and GenCorp. *Id.* at 1108-09, 1118. The Delaware Supreme Court emphasized that "GenCorp intentionally established and maintained minimum contacts with Delaware by its decision to continue to operate its wholly owned subsidiary, RKO General, as a Delaware corporation." *Id.* at 1122 (footnote omitted). The court also stated that "Delaware has a legitimate interest in providing a forum for hearing and applying Delaware law to a double derivative claim related to the internal operation of a wholly owned Delaware subsidiary." *Id.* at 1124. In particular, *Sternberg* establishes that "Delaware also has an interest in providing a forum for efficiently litigating, in a single proceeding, all issues and damages arising out of a double derivative claim alleging harm based upon the foreign parent corporation's maintenance of a Delaware subsidiary," *id.*, and that "[s]ince in a double derivative action both the parent and the subsidiary corporations are indispensable parties, the subsidiary's state of incorporation may be the only forum in which both corporations can be sued at all." *Id.* In this case, *California* is that forum, but the Ninth Circuit's analysis of *Sternberg* missed this critical point. App. 13a (147 F.3d at 920).

As with choice-of-law and forum selection issues, a court must perform an analysis of each state's competing public policies, determine the most convenient and accessible forum to the parties and, lastly, assure that a litigant is not deprived of a forum in which he or she could make a claim and have a remedy. *See Sadler v. NCR Corp.*, 928 F.2d 48, 53-55 (2d Cir. 1991) (law of state of company's incorporation was set aside and law of forum was applied

to permit plaintiff shareholders to obtain shareholder lists, a remedy which was not available to them under law of state of defendant company's incorporation).

In holding that Japanese law blocks the derivative claims Batchelder asserted on behalf of Honda *and* American Honda, the Ninth Circuit neglected to analyze (much less recognize) California's indisputable interest in applying federal and California state law and supplying a California forum and remedy to Batchelder. To permit the appellate court's misguided analysis to stand as precedent sends an unmistakable message that foreign countries with American wholly-owned subsidiaries may represent to ADR purchasers that they have the same rights as common stockholders, yet include a choice-of-law clause provision in the depository contract which the investors never see that effectively disregards the law of the investor's home country and shields the corporate directors and officers from civil liability, all of which is contrary, obnoxious, arbitrary, and fundamentally unfair to U.S. public policy. These are issues that are necessary and ripe for decision by this Court.

VI. HONDA VOLUNTARILY WAIVED THE FOREIGN PRIVATE ISSUER EXEMPTION BY ITS PROMISES AND PERFORMANCE OF THOSE PROMISES OVER TIME.

The Ninth Circuit disregarded Batchelder's allegation that false and misleading proxy materials were disseminated by Honda to ADR holders to solicit proxies for votes at the 1995 general shareholders meeting, in violation of §14(a) of the Exchange Act and SEC Rule 14(a)-9. *Compare* App. 16a-19a (147 F.3d at 922-23) *with* App. 87a-89a. For over 20 years, Honda disseminated to its U.S. investors through its depository (Morgan Guaranty) annual reports, proxy statements soliciting their votes,

and notices of its annual shareholders meetings, as it was obligated to do by its 1977 Listing Application with the NYSE and §5.06 of the Deposit Agreement. App. 32a.

The Exchange Act regulates the post-distribution trading of securities. *See* 15 U.S.C. §78a *et seq.* The " 'fundamental purpose' " of the Act was " 'to substitute a philosophy of full disclosure for the philosophy of *caveat emptor.*' " *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 171 (1994) (quoting *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151 (1972)). Section 14(a) requires issuers to comply with the SEC's rules and regulations governing solicitation of proxies. 15 U.S.C. §78n(a).

Under SEC Rule 3a12-3, foreign private issuers are generally exempt from proxy disclosure. Contrary to the Ninth Circuit's holding, App. 18a-19a (147 F.3d at 922-23), however, Honda *voluntarily* disseminated proxy materials to its U.S. investors, as it had obligated itself to do in the Deposit Agreement and as a condition of its 1977 NYSE listing. As such, Honda was bound to make true and complete disclosures about the qualifications of each director who was presented for re-election in 1995, *including* their acquiescence or participation in the bribe and kickback scheme and/or its cover-up. Moreover, by making proxy disclosures, Honda voluntarily and intentionally *waived* its right to rely on any SEC exemption and thereby became subject to §14(a) and its duty to truthfully disclose material facts. Contrary to the Ninth Circuit's opinion, *see* App. 16a-20a (147 F.3d at 922-23), SEC Rule 3a12-3 does *not* provide *any* exemption from §14(a) liability if the foreign securities issuer *voluntarily* disseminates false or misleading proxy materials to ADR holders in the U.S. Under the anti-fraud provisions of the federal securities laws, once a person or entity *voluntarily*

chooses to make a statement which is "reasonably calculated to influence the investing public" the speaker has a duty to disclose sufficient information so that the statement is not "false or misleading or . . . so incomplete as to mislead." *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 862 (2d Cir. 1968) (en banc); *see also McGann v. Ernst & Young*, 102 F.3d 390, 392-96 (9th Cir. 1996) (discussing continued vitality of *Texas Gulf*). Thus, "a duty to speak the full truth arises when a defendant undertakes to say anything." *First Virginia Bankshares v. Benson*, 559 F.2d 1307, 1317 (5th Cir. 1977).

The Ninth Circuit's decision in this case is truly breathtaking. Despite its voluntary contractual obligations and representations, Honda is free to tell or not tell its shareholders anything. It reduces the U.S. securities laws to approval of a proxy solicitation saying: "Sign this." The NYSE might as well have a separate listing of ADR securities labeled: Investments for Mushrooms: No Disclosure Rules Apply.

In its regulation of foreign securities issuers, the SEC has made an important distinction between foreign issuers that *voluntarily* enter the U.S. securities markets and those companies whose securities are traded in the U.S. without any significant voluntary acts or encouragement by the issuer. The SEC's rulemaking activity in this area has been governed by its "primary mandate . . . of investor protection. Thus, [U.S.] investors in foreign securities should be supplied with information equal as nearly as possible and practicable to that provided to investors in securities of domestic issuers." *Rules, Registration and Annual Report for Foreign Private Issuers*, Securities Exchange Act of 1934 Release No. 16371, 1979 SEC LEXIS 220, at *4 (Nov. 29, 1979). This result is, of course, the expectation of an investor purchasing ADRs on the

NYSE, but the decision of the court below directly contravenes that policy.

Even if Honda may have been *initially* exempt from issuing a proxy statement, *see* App. 16a-20a (147 F.3d at 922-23), its obligations changed once it obligated itself to its ADR holders and the NYSE to solicit proxies. "Even though the proxy was not legally required in this case, when defendants chose to issue a proxy plaintiffs have a right to a truthful one." *Wilson v. Great American Industries, Inc.*, 979 F.2d 924, 931 (2d Cir. 1992).[17] After all, "Congress intended the Exchange Act to have extraterritorial application in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities." *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir.), *rev'd in part on other grounds*, 405 F.2d 215 (2d Cir. 1968) (en banc). Fundamental principles of disclosure, truthfulness, and corporate accountability must be maintained in the U.S. securities markets, whether the securities issuer is General Motors or Honda.[18] By its decision in this case, however, the Ninth

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[17] The Ninth Circuit claimed that "*Wilson* is distinguishable from the current case . . . because, in *Wilson*, the defendant company was subject to [§]14(a)" while Honda is purportedly exempt under SEC Rule 3a12-3(b). App. 18a (147 F.3d at 922). The Second Circuit's opinion contains no such limitation. As a result of the panel's opinion in this case, however, ADR holders are not entitled to truthful proxy statements in the Ninth Circuit.

[18] *See* Breeden, *Foreign Companies* 17 Fordham Int'l L.J. at S77, S90-91 & S94-95 ("Beyond the issue of mere disclosure is the question of principles and values that may be most important. In a very real sense the U.S. disclosure system embodies our belief in openness and equality, and that belief is

Circuit inexplicably allowed Honda and its directors to escape these principles. The issue is of such fundamental importance that this Court should review and reverse the Ninth Circuit's decision.

CONCLUSION

For the foregoing reasons, Batchelder respectfully requests that this Court grant his Petition for Writ of Certiorari.

DATED: September 14, 1998

WILLIAM S. LERACH
MILBERG WEISS BERSHAD
HYNES & LERACH LLP
600 West Broadway
Suite 1800
San Diego, CA 92101
Telephone: 619/231-1058

-and-

KEVIN P. RODDY
MILBERG WEISS BERSHAD
HYNES & LERACH LLP
355 South Grand Avenue
Suite 4170
Los Angeles, CA 90071
Telephone: 213/617-9007

HENRY H. ROSSBACHER*
JAMES S. CAHILL
NANCI E. NISHIMURA
CLARA I. DURAN REED
ROSSBACHER & ASSOCIATES
445 South Figueroa Street
24th Floor
Los Angeles, CA 90071
Telephone: 213/895-6500

JONATHAN W. CUNEO
THE CUNEO LAW GROUP
317 Massachusetts Avenue, N.E.
Suite 300
Washington, D.C. 20002
Telephone: 202/789-3960

Attorneys for Petitioner

**Counsel of Record*

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one we not only apply to our political system but also to the corporate world as well.").

APPENDIX A

HARRY C. BATCHELDER, JR., Individually and Derivatively On Behalf of HONDA MOTOR COMPANY, LTD. and AMERICAN HONDA MOTOR COMPANY, INC., Plaintiff-Appellant,

vs.

NOBUHIKO KAWAMOTO, YOSHIHIDE MUNEKUNI, HIROYUKI YOSHINO, NOBUYKI MIYATA, KOICHI AMEMIYA, MASAKI IWAI, HIROYUKI SHIMOJIMA, TAKASHI MATSUDA, KOJI NAGATA, TAKESHI YAMADA, TOMOHIKO NAKANO, MAKOTO SHINO, RIKU IWAI, YOSHINO OKAWARA, KAZUO IBUKI, TADASHI KUME, TAKEO FUKUI, RYUICHI TSUKAMOTO, KATSURO SUZUKI, MICHIAKI SHINKAI, MICHIYOSHI HAGINO, SHINYA IWAKURA, ISAO SUZUKI, KAZUE ITO, KUNHIRO CHUJO, KENTARO KATO, KANAME KASAI, KENSUKE FUKATSU, TAKEO MATSUMOTO, HIROTADA KOMATSU, YUJI SAKASUME, MOTOATSU SHIRAISHI, MINORU HARADA, SATOSHI AOKI, ATSUYOSHI HYOGO, DENNIS JOSLEYN, STANLEY JAMES CARDIGES, GARY D. JOSLEYN, DAVID PEDERSEN, ROGER NOVELLY, ROBERT A MASSITELLI, FREDERICK W. MEIS, JR., EDWARD A. TEMPLE, THOMAS A. CAUFIELD, FRANK PISANO, BEATRICE SIKORA, JAMES SHORT, JOHN W. BILLMYER, LYON & LYON, and ROLAND NMI SMOOT, Defendants-Appellees.

No. 96-56565
D.C. No. CV-96-1291-RSWL
United States Court Of Appeals For The Ninth Circuit
ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
Ronald S.W. Lew, District Judge, Presiding

Argued and Submitted

April 7, 1998 – Pasadena, California

Filed June 15, 1998
Amended July 15, 1998

Before: Jerome Ferris, Dairmuid F. O'Scannlain, and Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge O'Scannlain

ORDER

The panel's opinion filed June 15, 1998 is amended as follows:

On page 5980 of the slip opinion, the sentence starting on line 5, which reads, "What Batchelder fails to note, however, is that we overruled *Richards* sitting en banc in *Richards*, 135 F.3d at 1294.", is hereby deleted and replaced with, "We overruled *Richards* sitting en banc in *Richards*, 135 F.3d at 1294, however."

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether the holder of an American Depository Receipt has standing to bring a shareholder derivative action against a Japanese corporation.

I

This is a derivative action brought by Harry C. Batchelder, Jr. on behalf of Honda Motor Company, Ltd. ("Honda Japan") and American Honda Motor Company, Inc. ("American Honda") for wrongs allegedly committed

by directors, officers, and employees of Honda Japan and American Honda (the "Director Defendants"), and by certain third parties, including Lyon & Lyon and Roland Smoot (collectively, "Lyon & Lyon"). Honda Japan was incorporated under the laws of Japan. It is the sole shareholder of American Honda, a California corporation.

Harry C. Batchelder, Jr. alleges that at all times relevant to this case he owned 1,246 American Depository Receipts ("ADRs"), each of which reflects ownership of ten shares of stock in Honda Japan. The ADRs are issued by the depository, Morgan Guaranty Trust Company of New York. Batchelder purchased his ADRs under the terms and conditions of a deposit agreement ("Deposit Agreement") with Honda Japan and Morgan Guaranty. Batchelder alleges that the directors of both Honda Japan and American Honda breached their fiduciary duties by failing adequately to protect the companies from harm caused by the actions of certain American Honda employees who were involved in a bribery and kickback scheme. Batchelder also purports to bring suit against the law firm of Lyon & Lyon, American Honda's former general counsel, and two of its partners, Roland Smoot and James Short, who, Batchelder claims, assisted in "covering up" the fraudulent scheme. Batchelder has asserted "shareholder" derivative claims for breach of duty, waste of corporate assets, abuse of control, constructive fraud, mismanagement, and dissemination of false and misleading proxy statements in violation of 15 U.S.C. § 78n(a).

Following the Director Defendants' motion to dismiss, the district court entered a scheduling order staying

all discovery in the case pending its resolution. Thereafter, American Honda and Lyon & Lyon also filed motions to dismiss on numerous grounds. Following a hearing, the district court dismissed Batchelder's complaint with prejudice. The district court ruled that Batchelder's complaint failed as a matter of law because, *inter alia*: (1) based on the Deposit Agreement, Batchelder's standing to bring a derivative action must be determined under Japanese law; (2) under Japanese law, Batchelder is not a shareholder and therefore lacks standing to bring a derivative action on behalf of Honda Japan; and (3) even if Batchelder could assert the rights of a shareholder of Honda Japan, his action would still fail as against American Honda and Lyon & Lyon because Japanese law recognizes neither "double derivative"[1] actions nor actions against third parties.

Batchelder timely appealed.

II

Batchelder maintains that the district court erred in holding that he lacks standing to bring a shareholder

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[1] "A 'double derivative' suit has been defined as an action brought by a shareholder of a holding or parent company, on behalf of that corporation, to enforce a cause of action in favor of the subsidiary company. The shareholder is, in essence, maintaining a derivative action on behalf of the subsidiary, since the holding or parent company has derivative rights to the cause of action possessed by the subsidiary. The directors of both the parent and the subsidiary must refuse to enforce the cause of action." *Federal Deposit Insurance Corporation v. Alshuler (In re Imperial Corp. of America)*, 92 F.3d 1503, 1509 n.10 (9th Cir. 1996) (citation omitted).

derivative action on behalf of Honda Japan and American Honda. According to Batchelder, the district court erroneously held that his "standing and his right to bring a derivative action . . . must be determined under Japanese law," and wrongly concluded that, as an owner of Honda Japan ADRs, he "is not a shareholder and lacks standing to bring a derivative action on behalf of Honda . . . under governing Japanese law." Batchelder contends that whereas Japanese law provides the substantive law to adjudicate his claims against the Director Defendants, it does not control his standing to bring California and federal claims on behalf of Honda Japan and American Honda. According to Batchelder, the district court must perform "the requisite conflicts of law analysis" to determine what law governs his right to bring a derivative suit. Batchelder contends that either Fed. R. Civ. P. 23.1 ("Derivative Actions by Shareholder") or Cal. Corp. Code § 800 ("Shareholder Derivative Actions") provides the standing requirements for his claim, not Japanese law.

A

Batchelder's right to bring derivative claims on behalf of Honda Japan and American Honda is indeed governed by Japanese law. Batchelder purchased his ADRs pursuant to the Deposit Agreement, which expressly provides that the law of Japan governs shareholder rights. Section 7.07 of the Deposit Agreement, entitled "Governing Law," states:

> This Deposit Agreement and the [American Depository] Receipts and all rights hereunder and thereunder and provisions hereof and thereof shall be governed by and construed in

> accordance with the laws of the State of New York, United States of America. It is understood that notwithstanding any present or future provision of the laws of the State of New York, *the rights of holders of Stock and other Deposited Securities, and the duties and obligations of the Company in respect of such holders, as such, shall be governed by the laws of Japan.*

(emphasis added). The first sentence of § 7.07 provides that contract rights contained in the Deposit Agreement itself or in the ADR certificates, as well as the construction of the Deposit Agreement, are to be governed by the laws of New York. The second sentence of § 7.07, however, explicitly provides that Japanese law governs shareholder rights and the rights of holders of other Deposited Securities, including ADRs. Thus, if an ADR holder seeks to assert a right belonging to shareholders or a right not specifically granted to ADR holders in the Deposit Agreement, the laws of Japan apply. Section 7.07 is simply a choice-of-law clause.

1

We analyze the validity of choice-of-law clauses under *The Breman v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), in which the Supreme Court stated that courts should enforce choice-of-law and choice-of-forum clauses in cases of "freely negotiated private international agreements." *Id.* at 12-13; *see also Richards v. Lloyd's of London*, 135 F.3d 1289, 1293 (9th Cir. 1998) (en banc). There is every reason to believe that the Depository Agreement was such an agreement. *See* American Depository Receipts, Securities Act of 1933, Exchange Act Release

Nos. 33-6984, 34-29226 (May 23, 1991) ("[T]he deposit agreement constitutes the contract between the issuer of the deposited securities, the depository and the holders of ADRs. ADR holders are deemed to have agreed to all terms in the deposit agreement by their acceptance and holding of ADRs."). Contractual choice-of-law clauses are routinely enforced, particularly when the country whose law is selected has some nexus with the action. *See Northrop Corp. v. Triad Int'l Marketing S.A.*, 811 F.2d 1265, 1270 (9th Cir. 1987) ("[C]hoice-of-law and choice-of-forum provisions in international commercial contracts are 'an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction,' and should be enforced absent strong reasons to set them aside.") (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-20 (1974)); *see also Marine Midland Bank, N.A. v. United Missouri Bank, N.A.*, 643 N.Y.S.2d 528, 530 (N.Y. App. Div. 1996) ("As a general rule, choice of law provisions . . . are valid and enforceable in this State.").[2] We analyze § 7.07 in light of these principles.

Batchelder has never contended that the Deposit Agreement itself grants ADR holders the right to bring shareholder derivative claims. He argues instead that he is entitled to bring derivative claims because he "is a Honda shareholder" through his ownership of ADRs. Because Batchelder is attempting to assert a right not expressly granted to him by the Deposit Agreement – the

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[2] As noted above, under the first sentence of § 7.07, the Deposit Agreement itself, including the choice-of-law clause, is governed by and construed according to New York law.

right to bring a derivative suit – the plain language of the second sentence of § 7.07 directs this court to apply Japanese law to determine the existence and scope of Batchelder's right. No conflicts-of-law analysis is required.

2

Incredibly, Batchelder completely failed to address the vital second sentence of § 7.07 in his opening brief before this court. He instead made only a brief reference to the first sentence of § 7.07 in a footnote and, even there, grossly misrepresented the meaning of the provision. Quoting selectively, Batchelder represented that "Section 7.07 of the Deposit Agreement states that 'all rights hereunder . . . shall be governed by and construed in accordance with the laws of . . . New York.' " From this snippet, one would think that New York law governs Batchelder's claim. Not so. In response to Lyon & Lyon's exposure of his attempt to mislead this court, Batchelder raises a number of arguments regarding § 7.07 for the first time in his reply brief.

a

Batchelder first argues that *Richards v. Lloyd's of London*, 107 F.3d 1422 (9th Cir. 1997), renders § 7.07 void. In *Richards*, a 3-judge panel of this court held that forum-selection and choice-of-law clauses in an agreement between American external "Names" (which are similar to stockholders) and the British entity of Lloyd's of London were invalid for purpose of the Names' claims under the Securities Act of 1933 and the Securities Exchange Act

of 1934 because the clauses operated to effect waivers of compliance with the Acts. *Id.* at 1427. Batchelder maintains that the similarity between the clause held invalid in *Richards* and § 7.07 in the Deposit Agreement compels the conclusion that § 7.07 is void. We overruled *Richards* sitting en banc in *Richards*, 135 F.3d at 1294, however. The en banc court held that the anti-waiver provisions of the federal securities statutes do *not* void choice-of-forum and choice-of-law provisions calling for application of English law in international "general undertaking" agreements governing investment of American Names in Lloyd's of London syndicates – precisely the opposite of Batchelder's argument. *Id.* Consequently, Batchelder's argument on that score is meritless.

b

Batchelder also maintains in his reply brief that he was never given a copy of and never consented to § 7.07. Accordingly, he never agreed that his "rights and claims as an ADR holder could be decided only by a court sitting in Japan." Batchelder contends that "§ 7.07 is nothing more than a secret forum selection clause . . . designed to defeat the jurisdiction of all U.S. courts." This argument is without merit. First, as noted above, "ADR holders are deemed to have agreed to all terms in the deposit agreement by their acceptance and holding of ADRs." American Depository Receipts, Securities Act of 1933, Exchange Act Release Nos. 33-6984, 34-29226 (May 23, 1991). Presumably, the words "all terms" do not mean "some terms" or "all terms except for choice-of-law terms." Second, "[t]he Supreme Court has noted that simply alleging that one was duped into signing the contract is not

enough. . . . For a party to escape a forum selection clause on the grounds of fraud, it must show that 'the inclusion of that clause in the contract was the product of fraud or coercion.' " *Richards*, 135 F.3d at 1297. (quoting *Scherk*, 417 U.S. at 519 n.14). We see no reason to treat choice-of-law clauses any differently from forum-selection clauses. Because Batchelder has shown neither fraud nor coercion, he cannot avoid the effect of the Deposit Agreement's choice-of-law clause.

c

Batchelder further argues that § 7.07 is unreasonable and thus unenforceable under California law and public policy in that it prohibits him from bringing a double derivative claim on behalf of American Honda in California. Batchelder maintains that California law "recognizes important public policies underlying a derivative action . . . when injury is caused to the corporation that may not otherwise be redressed because of the failure of the corporation to act." He claims that because Cal. Corp. Code § 800 applies to actions brought on behalf of "any domestic or foreign corporation," § 7.07 cannot be invoked to avoid the application of California law to his double derivative action. This argument lacks force. First, assuming California does recognize the importance of derivative suits, California's interest would not be defeated by the application of Japanese law to Batchelder's claim. He is plainly not without remedies; he can become a shareholder of Honda Japan at any time simply by exchanging his ADRs for shares of Honda Japan. The fact that Japanese law may differ in this regard from California law does not necessarily signify that application of Japanese

law would contravene California's public policy. *See, e.g., General Signal Corp. v. MCI Telecommunications Corp.*, 66 F.3d 1500, 1506 (9th Cir. 1995). Second, in making his claim that California law and public policy would be offended by the application of § 7.07 to bar his double derivative suit against American Honda, Batchelder glosses over the rather significant fact that California has never expressly recognized double derivative suits. Indeed, one decision even suggests that California would bar such suits. *See Gaillard v. Natomas Co.*, 173 Cal.App.3d 410, 419 (1985) (suggesting no double derivative action in California because Cal. Corp. Code § 800 requires contemporaneous ownership of shares in corporation on behalf of which suit was brought). Consequently, we also reject this argument.

3

In sum, the parties chose to be governed by Japanese law in the Deposit Agreement. Batchelder has failed to provide any persuasive reason why this court should not honor that agreement. Consequently, the district court correctly determined that Batchelder's standing to bring a derivative suit is governed by Japanese law.

B

In any event, even if we were to ignore the Deposit Agreement's choice-of-law provision, ordinary conflicts-of-law principles would direct us to apply Japanese law to Batchelder's claim. Batchelder holds an interest in Honda Japan, not American Honda. Under the "internal affairs" doctrine, the rights of shareholders in a foreign

company, including the right to sue derivatively, are determined by the law of the place where the company is incorporated. *See Hausman v. Buckley*, 299 F.2d 696, 702 (2d Cir. 1962); *McDermott Inc. v. Lewis*, 531 A.2d 206, 214-17 (Del. 1987); *Levine v. Milton*, 219 A.2d 145, 147 (Del. 1966); *cf. CTS Corp v. Dynamics Corp. of America*, 481 U.S. 69, 89 (1987) ("This beneficial free market system depends at its core upon the fact that a corporation – except in the rarest situations – is organized under, and governed by, the law of a single jurisdiction, traditionally the corporate law of the State of incorporation."). The internal affairs doctrine is equally applicable to double derivative claims brought on behalf of an American subsidiary. *Cf. Kostolany v. Davis*, 1995 WL 662683, *1-3 (Del.Ch. 1995) (applying Dutch law to determine a shareholder's right to bring double derivative claims because "plaintiff is a stockholder of the Dutch parent, not of the Delaware subsidiaries"). Consequently, Batchelder's prerogative to step into the shoes of the parent corporation as derivative plaintiff, or of the subsidiary as double derivative plaintiff, must be determined by the law of the place of incorporation of the company in which he holds an interest; in this case, that place is Japan.

Batchelder claims that the internal affairs doctrine should not apply to this case. He claims that the Delaware Supreme Court recognized in *Sternberg v. O'Neil*, 550 A.2d 1105 (Del. 1988), that, in a double derivative action, the internal affairs doctrine mandates application of the law of the state of the parent's incorporation only to the internal affairs of the parent; the law of the state of incorporation of the subsidiary applies to the subsidiary's internal affairs. However, Batchelder overstates the effect

of *Sternberg*. The issue before the *Sternberg* court was whether it had personal jurisdiction over an Ohio parent company in a double derivative suit against a Delaware subsidiary, "not choice of law." *Sternberg*, 550 A.2d at 1123. The court even noted that, if jurisdiction over the Ohio corporation was established in Delaware, "Delaware's well established conflict of laws principles require that the laws of the jurisdiction of incorporation govern internal corporate relationships. . . . However, *that choice of law concern should not 'complicate or distort the jurisdictional inquiry.'* " *Id.* (emphasis added) (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778 (1984)).

Accordingly, even ignoring the parties' agreement and applying conflicts-of-law principles, we would still apply Japanese law to determine the existence and scope of Batchelder's derivative claims. The district court did not err in holding that Japanese law applies.

III

Batchelder next argues that, even under Japanese law, he *is* a Honda Japan shareholder who is entitled to bring suit on behalf of the parent company *and* assert a double derivative claim on behalf of its subsidiary, American Honda. According to Batchelder, the district court "ignored the fact that ADRs are the equivalent of shares of a foreign corporation and ADR holders are equivalent to a shareholder [sic] of that corporation, whether under Japanese law or U.S. law." Batchelder further maintains that the district court erred in finding that he failed properly to assert "double derivative" claims on behalf of Honda Japan and American Honda. He contends that the

district court also "ignore[d] the fact that California substantive law applies to derivative claims asserted by Batchelder on behalf of American Honda" as well as "numerous precedents recognizing the validity of 'double derivative' claims under these circumstances."

Article 267 of the Japanese Commercial Code, which establishes the derivative remedy, states:

> 1. Any shareholder who has held a share continuously for the last six months may demand, in writing, that the stock company institute an action to enforce the liability of directors.
>
> 2. If the stock company has failed to institute such action within thirty days from the date on which the demand referred to in the preceding paragraph was made, the shareholder referred to in the preceding paragraph may institute such action on behalf of the company.

Shoho (Commercial Code), Law No. 48 of 1899 [Shoho] Art. 267. Notwithstanding his concessions that he holds ADRs, not shares, in Honda Japan, and that Article 267 confers derivative standing only on "any shareholder," Batchelder claims, that as an ADR holder, he is "equivalent to a shareholder" and should have been permitted to proceed with his derivative suit. The weight of authority, however, is against him.

Honda's Japanese law experts testified that only shareholders appearing on Honda Japan's shareholders' register may institute a derivative action under Article 267(1). "ADR holders are not shareholders of record" under Japanese law and therefore "are not allowed to make the demand and then institute a derivative action." (Kitazawa Decl.). According to one of Honda's experts,

Professor Kitazawa, "[t]he law on this point is undisputed; I now of no case or scholarly opinion that argues otherwise." *Id.* Another of Honda's experts stated unequivocally that "Under Japanese law, a holder of [ADRs] would not be considered under Japanese law to be a registered shareholder and, therefore, would have no right or power to make the requisite pre-suit demand or to initiate the instant derivative litigation." (Henderson Decl.).

Batchelder has submitted no authority to compel a different conclusion. While he maintains that "the opinions of Japanese legal experts cast the district court's conclusory opinion into considerable doubt" and that the "applicable foreign law was arguably unclear," the testimony of his experts supports no such conclusion. Indeed, one of his "practicing-attorney-experts" frankly admitted that:

> When there exists . . . a pro forma shareholder and a de facto shareholder [an ADR holder], the question arises as to which shareholder corresponds to the shareholder referred to in [Article 267(1)]. As far as I know, no court in Japan has ever ruled on this issue. Therefore, *it is impossible to say whether an ADR possessor, without being registered on the shareholder registry, has standing to bring an action. It remains to be seen how the courts in Japan would rule on this question.*

(Sakata Decl.) (emphasis added). Another Batchelder expert conceded that:

> Article 267 establishes the qualification of a plaintiff as a shareholder who has a share(s) for six months. However, a prevailing view of commentators is that such shareholder shall be a

> 'registered shareholder' on the book of the company for six months. . . . There is no court case on this point, *presumably because all plaintiffs to date in shareholder derivative actions were shareholders of record*. . . . [W]e are unable to locate any court case or specific discussions by commentators *except for a mere conclusion that the prevailing view is that a plaintiff-shareholder shall be a shareholder of record.*

(Hirakawa Decl.) (emphasis added). It is noteworthy that Batchelder's Japanese law scholar did not opine on this subject.

In light of the foregoing, the district court correctly found that Batchelder lacked standing as an ADR holder under Japanese law to bring his shareholder derivative action on behalf of Honda Japan.[3]

IV

Finally, Batchelder claims that the district court erred by dismissing his proxy claim brought under § 14 of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S. C. § 78n(a), on the ground that Honda's securities were

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[3] Because Batchelder is not a registered shareholder under Japanese law entitled to bring a derivative suit on behalf of Honda Japan, we need not reach his claim that he was entitled to bring a double derivative suit on behalf of American Honda. Likewise, we need not reach the *forum non conveniens* issue or the claim that the district court erred in dismissing the action on grounds of Japan's exclusive jurisdiction and international comity.

exempt under the Exchange Act. The district court held that Batchelder's "claim under the federal proxy laws fails because [Honda] is a 'foreign private issuer' under rules promulgated by the [Securities and Exchange Commission], and [Honda] securities are thereby exempt from the requirements of section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a),[4] and Rule 14a-9, 17 C.F.R. § 240.14a-9."[5] Batchelder maintains that this decision was error because, even if Honda Japan was exempt from filing proxy materials with the Securities and Exchange Commission ("SEC"), the Director Defendants are nonetheless alleged to have disseminated false and misleading proxy materials to holders of Honda Japan common stock and ADRs in an effort to solicit proxies for votes at the June 29, 1995 general meeting of shareholders. Batchelder claims that having voluntarily distributed proxy materials, Honda was bound to make true and complete disclosures about the qualifications of each director presented for reelection.

In support of this proposition, Batchelder relies upon *Wilson v. Great American Industries*, 979 F.2d 924 (2d Cir.

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[4] Section 14(a) states that it is unlawful to solicit proxies in contravention of "such rules and regulations as the [Securities and Exchange Commission] may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78n(a).

[5] Rule 14a-9, the rule at issue in this case, provides, in pertinent part, that "[n]o solicitation subject to this regulation shall be made by means of any proxy statement . . . which, at the time . . . it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading." 17 C.F.R. § 240.14a-9.

1992). In *Wilson*, the defendant company held enough shares to approve a proposed merger by a supermajority vote and therefore had no need to solicit proxies or send proxy materials to complete the transaction. However, the defendant nevertheless proceeded to disseminate proxy materials. The Second Circuit held that the proxy materials had to comply with § 14(a), even though the defendant could have permissibly voted its own shares to consummate the transaction without ever soliciting proxies. *See id.* at 931-32. The fact that the solicitation was unnecessary did not excuse the defendant from compliance with the proxy statute or the proxy rules. *See id.* The court held that "[e]ven though the proxy was not legally required in this case, when defendants choose to issue a proxy plaintiffs have a right to a truthful one." *Id.* Likewise, Batchelder argues, Honda Japan was required to provide a truthful proxy when it promised to send or to make available materials concerning shareholder meetings to its ADR holders in § 5.06 of the Deposit Agreement and in its 1977 Listing Application to the New York Stock Exchange.

Wilson is distinguishable from the current case, however, because, in *Wilson*, the defendant company was subject to § 14(a). Here, Honda Japan is exempt under Rule 3a12-3(b), which exempts foreign private issuers from the provisions of § 14(a).[6] Batchelder has failed to

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[6] Rule 3a12-3(b) provides that: "Securities registered by a foreign private issuer, as defined in Rule 3b-4 (§ 240.3b-4 of this chapter) shall be exempt from section 14(a), 14(c), 14(f) and 16 of the Act." 17 C.F.R. § 240.3a12-3(b).

put forth any argument as to why Honda Japan should not be considered a "foreign private issuer" under Rule 3b-4(c). Instead, he claims that once a company holds itself out to shareholders and required to file and send out proxy statements pursuant to § 14(a), it loses the Rule 3a12-3(b) exemption. Batchelder maintains that Honda Japan so held itself out in § 5.06 of the Deposit Agreement and in its 1977 Listing Application. True or not, this does not help Batchelder's case. The plain language of Rule 3a12-3(b) contains no such qualification. Rule 3a12-3(b) is clear with regard to Honda Japan's obligations under § 14(a) of the Exchange Act and the rules promulgated thereunder – it has none. Consequently, we hold that the district court properly dismissed Batchelder's § 14(a) claim.

The term "foreign private issuer" means any foreign issuer other than a foreign government except an issuer meeting the following conditions:

(1) More than 50 percent of the outstanding voting securities of such issuer are held of record either directly or through voting trust certificates or depository receipts by residents of the United States; and

(2) Any of the following:

(i) The majority of the executive officers or directors are United States citizens or residents,

(ii) More than 50 percent of the assets of the issuer are located in the United States, or

(iii) The business of the issuer is administered principally in the United States. For the purpose of this paragraph, the term "resident," as applied to security holders, shall mean any person whose address is on the records of the issuer, the voting trustee, or the depository as being located in the United States. 17 C.F.R. § 240.3b-4.

V

For the foregoing reasons, we conclude that the district court did not err in holding that Batchelder, as an ADR holder, lacks standing to bring a shareholder derivative suit on behalf of Honda Japan. We also hold that the district court did not err in dismissing Batchelder's proxy claims brought under § 14 of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a). The district court's dismissal of Batchelder's action is therefore

AFFIRMED.

APPENDIX B

HARRY C. BATCHELDER, JR., Individually and Derivatively on behalf of HONDA MOTOR COMPANY, LTD. and AMERICAN HONDA MOTOR COMPANY, INC., Plaintiff,

vs.

NOBUHIKO KAWAMOTO, et al., Defendants and HONDA MOTOR COMPANY, LTD. AND AMERICAN HONDA MOTOR COMPANY, INC., Nominal Defendants.

No. CV 96-1291 (RSWL) (BQRx)
United States District Court
Central District of California
Western Division
September 24, 1996

The Motion of the Defendants Takeshi Yamada, Takeo Fukui, Koichi Amemiya and Isao Suzuki and Nominal Defendant American Honda Motor Co., Inc. To Dismiss For Failure To State A Claim And On Grounds Of International Comity and Forum Non Conveniens and the Motion To Dismiss of Lyon & Lyon and Ronald Smoot came on for hearing before this Court on August 26, 1996. William S. Lerach and Kevin P. Roddy of Milberg Weiss Bershad Hynes & Lerach and James S. Cahill and Nanci Nishimura of Rossbacher & Associates appeared for plaintiff Harry C. Batchelder, Jr. Cedric C. Chao and Dennis M. Perluss of Morrison & Foerster and Yuji Iwanaga of Pillsbury Madison & Sutro appeared for defendants and moving parties Yamada, Fukui, Amemiya and Suzuki; Richard A. Cirillo of Rogers & Wells appeared for nominal defendant and moving party American Honda Motor Co.; Jeremiah T. O'Sullivan of Choate,

Hall & Stewart and Pamala J. King of Hennigan, Mercer & Bennett appeared for defendants and moving parties Lyon & Lyon and Smoot; and George W. Buehler of Howrey & Simon appeared for defendant James Short.

After consideration of the briefs and arguments of counsel, the declarations and exhibits submitted in support of and in opposition to the motions, and all other matters presented to the Court, and good cause appearing,

IT IS HEREBY ORDERED that the motions to dismiss are granted on the following grounds:

1. Plaintiff Batchelder's standing and his right to bring a derivative action, as well as the scope of and limits on that right, must be determined under Japanese law.

2. As the owner of American Depositary Receipts ("ADRs"), plaintiff is not a shareholder and lacks standing to bring a derivative action on behalf of Honda Motor Co. ("HMC") under governing Japanese law.

3. Even if plaintiff could assert the rights of a shareholder of HMC, his action would still fail.

a. Under Japanese law, derivative actions may be brought only against specific individuals, that is, directors, promoters and statutory auditors of the corporation in which the shareholder holds stock. Plaintiff holds an interest in HMC, not American Honda Motor Co. ("AHM"). Plaintiff therefore cannot bring a double derivative action against the directors or officers of AHM (including Messrs. Smoot and Short) or against third party Lyon & Lyon.

b. Plaintiff's claim under the federal proxy laws fails because HMC is a "foreign private issuer" under rules promulgated by the SEC, and HMC securities are thereby exempt from the requirements of section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a), and Rule 14a-9, 17 C.F.R. § 240.14a-9.

c. Under governing Japanese law, plaintiff's derivative action may proceed only in Tokyo District Court.

d. Under principles of international comity, plaintiff's derivative action is more properly brought in Japan.

e. For the reasons stated in the Honda defendants' papers in support of dismissal under the doctrine of forum non conveniens, plaintiff's derivative action against the HMC directors is more properly brought in Japan.

IT IS FURTHER ORDERED that plaintiff's request for leave to amend the complaint to allege a claim under section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, made orally at the hearing on the motions to dismiss, is hereby denied on the ground that any proposed amendment would be futile.

Accordingly, the defendants' motions to dismiss are granted and the action is hereby DISMISSED WITH PREJUDICE.

/s/ Ronald S. W. Lew
Ronald S. W. Lew
United States District Judge

APPENDIX C

HARRY C. BATCHELDER, JR., Individually and Derivatively On Behalf of HONDA MOTOR COMPANY, LTD. and AMERICAN HONDA MOTOR COMPANY, INC., Plaintiff,

vs.

NOBUHIKO KAWAMOTO, YOSHIHIDE MUNEKUNI, HIROYUKI YOSHINO, NOBUYKI OTSUKA, MASARU MIYATA, KOICHI AMEMIYA, MASAKI IWAI, HIROYUKI SHIMOJIMA, TAKASHI MATSUDA, KOJI NAGATA, TAKESHI YAMADA, TOMOHIKO NAKANO, MAKOTO SHINO, RIKU IWAI, YOSHIO OKAWARA, KAZUO IBUKI, TADASHI KUME, TAKEO FUKUI, RYUICHI TSUKAMOTO, KATSURO SUZUKI, MICHIAKI SHINKAI, MICHIYOSHI HAGINO, SHINYA IWAKURA, ISAO SUZUKI, KAZUE ITO, KUNIHIRO CHUJO, KENTARO KATO, KANAME KASAI, KENSUKE FUKATSU, TAKEO MATSUMOTO, HIROTADA KOMATSU, YUJI SAKAZUME, MOTOATSU SHIRAISHI, MINORU HARADA, SATOSHI AOKI, ATSUYOSHI HYOGO, DENNIS JOSLEYN, JOHN W. BILLMYER, STANLEY JAMES CARDIGES, GARY D. JOSLEYN, DAVID L. PEDERSEN, ROBERT N. RIVERS, ROGER NOVELLY, ROBERT A. MAZZITELLI, FREDERICK W. MEIS, JR., EDWARD A. TEMPLE, HUGH P. COOPER, MARK L. BENSON, THOMAS A. CAULFIELD, DAMIEN C. BUDNICK, FRANK PISANO, BEATRICE SIKORA, JOHN J. CONWAY, LYON & LYON, ROLAND SMOOT AND JAMES SHORT, Defendants, and HONDA MOTOR COMPANY, LTD. and AMERICAN HONDA MOTOR COMPANY, INC., Nominal Defendants.

United States District Court
Central District Of California
Southern Division

No. CV-96-1291 GHK(BQR)

VERIFIED SHAREHOLDER DERIVATIVE COMPLAINT FOR INTENTIONAL OR GROSSLY NEGLIGENT BREACH OF DUTY; MISMANAGEMENT; WASTE OF CORPORATE ASSETS; ABUSE OF CONTROL; CONSTRUCTIVE FRAUD; AND VIOLATIONS OF THE SECURITIES EXCHANGE ACT OF 1934

Plaintiff, Harry C. Batchelder, Jr. ("Batchelder"), by counsel and for his Verified Shareholder Derivative Complaint ("Complaint") against defendants, alleges and says:

NATURE OF THE ACTION

1. (a) This is a shareholder derivative action brought by Batchelder on behalf of the Nominal Defendants, Honda Motor Company, Ltd. ("Honda" or the "Company"), a Japanese corporation, and American Honda Motor Company, Inc. ("American Honda"), a California corporation with its principal place of business located at 700 Van Ness Avenue, Torrance, California, pursuant to Federal Rules of Civil Procedure 23.1, § 2116 of the California Corporations Code and § 14(a) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78n(a), against the Managing Directors, Representative Directors and Directors of Honda and American Honda (collectively the "Director Defendants"), in addition to other defendants, alleging mismanagement, waste of corporate assets, breach of duty, abuse of control, constructive fraud and dissemination of a false and misleading proxy statement.

(b) During 1994-1995, it was revealed that over a 12-year period from approximately 1980 to 1992, Honda

and American Honda were victims of the largest commercial bribery scheme in United States history, involving over $15 million in bribes, kickbacks and payoffs paid to Honda and American Honda executives by automobile dealers (collectively the "American Honda Defendants"). (The Director Defendants are identified in ¶10 of this Complaint while the American Honda Defendants are identified in ¶11.) Pursuant to this multi-faceted fraudulent scheme, valuable property rights belonging to Honda and American Honda, namely, Honda automobile dealerships located in virtually every part of this country, were awarded in exchange for cash and gifts. During the 1980s and early 1990s, when American consumers routinely paid thousands of dollars above the dealer's sticker price for popular Honda automobiles, including Honda Accords, Civics and Preludes, scarce vehicles were awarded to dealers who gave Honda and American Honda executives expensive gifts including Mercedes Benz automobiles, Rolex watches, swimming pools for their homes, jewelry for their wives, college tuition for their children and envelopes filled with cash. Federal prosecutors have publicly stated that Honda and American Honda were the principal victims of this multi-million dollar fraudulent scheme, a pronouncement which has repeatedly been endorsed by Honda's spokespersons.

2. Following a two-year investigation carried out by the United States Attorney's Office in the District of New Hampshire, in 1994 federal prosecutors charged two dozen persons, including 18 former American Honda sales executives and two Honda dealers, with numerous federal criminal offenses, including mail fraud, racketeering and conspiracy. A total of 22 persons subsequently pled guilty to federal charges and in June 1995, following

a three-month federal court jury trial, the two remaining defendants – former American Honda executives Dennis Josleyn ("Josleyn") and John W. Billmyer ("Billmyer") – were found guilty. Testimony in their 1995 criminal trial revealed that they and other American Honda executives had accepted millions of dollars in bribes and kickbacks paid by Honda dealers located in 30 states, including gifts of cash, fur coats, furniture, interest-free loans, jewelry, real estate, Hong Kong shopping sprees, Mercedes Benz automobiles, swimming pools and payments of college tuition. In addition, the evidence at their criminal trial revealed that defendant Josleyn siphoned millions of dollars from Honda and American Honda by improperly referring advertising and sales training business to outside companies that he controlled.

3. (a) Notwithstanding the above-referenced indictments, guilty pleas and criminal convictions, the United States Attorney's Office in the District of New Hampshire has announced that its investigation is continuing and that additional criminal charges against other persons are expected to be filed in the near future. The continuing federal investigation and resulting criminal prosecutions, guilty pleas and convictions have already resulted in nearly 40 civil lawsuits being brought against Honda and American Honda in federal and state courts in California and elsewhere by Honda dealers who feel betrayed because other dealers were given preferential treatment in return for the payment of bribes. In addition, Honda and American Honda face administrative proceedings in the State of North Carolina arising out of the fraudulent scheme detailed in this Complaint.

(b) Upon information and belief, in 1994 Honda and/or American Honda paid several million dollars to

settle one dealer's lawsuit brought in the District of New Hampshire. As a result of the dozens of lawsuits which remain pending, Honda and American Honda face multi-million dollar liability. Honda and American Honda have already incurred millions of dollars in costs of legal defense and investigation which will continue and increase in the foreseeable future, in addition to the incalculable injury to business reputation which Honda and American Honda have already suffered. Notwithstanding the above-referenced federal court indictments, guilty pleas and criminal convictions, as well as the pending dealer lawsuits, neither Honda nor American Honda has ever commenced legal proceedings against *any* person or entity seeking to recover the multi-million dollar damages which they have suffered by reason of the massive fraudulent scheme detailed in this Complaint.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over the First, Second, Third, Fourth, Fifth and Sixth Causes of Action asserted in this Complaint because the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between citizens of different states, pursuant to 28 U.S.C. § 1332(a). This Court has subject matter jurisdiction over the Seventh Cause of Action asserted in this Complaint under § 27 of the Exchange Act, 15 U.S.C. § 78aa, and the federal question statute, 28 U.S.C. § 1331.

5. Venue is properly laid in this District, pursuant to 28 U.S.C. § 1391, because (a) one or more of the defendants reside here and (b) a substantial part of the events or omissions giving rise to Batchelder's claims occurred

in this District. In addition, venue is properly laid in this District pursuant to § 27 of the Exchange Act because acts or transactions constituting violations of § 14(a) of the Exchange Act, 15 U.S.C. § 78n(a), occurred here, including the dissemination of false and misleading proxy statements.

6. This Court has personal jurisdiction over each of the defendants because (a) they reside in and/or have requisite minimum contacts with the United States and/or the State of California; (b) they have purposefully availed themselves of the privilege of conducting activities within the United States and/or the State of California; and/or (c) their acts and transactions, as detailed in this Complaint, have had an effect within the United States and/or the State of California.

THE PARTIES

A. Plaintiff

7. At all times relevant to the claims asserted in this Complaint, Batchelder has been the owner of 1,246 American shares, each representing 10 shares of Honda stock and evidenced by American Depository Receipts ("ADRs"), and he continues to hold those securities. Batchelder is a United States citizen and a resident of the State of New York.

B. Nominal Defendants Honda And American Honda

8. (a) Nominal Defendant Honda was incorporated on September 24, 1948 under the laws of Japan as Honda Giken Kogyo Kabushiki Kaisha. Honda is a worldwide company engaged in the development, manufacture

and sale of a wide variety of products using internal combustion engines, including automobiles, motorcycles, and power products such as portable generators, small general purpose engines, lawn mowers and tractors, power tillers, outboard engines and four-wheeled all-terrain vehicles. Honda's extensive product development, manufacturing, sales and financing operations in the United States are carried out through a number of wholly-owned subsidiaries, including:

(i) Honda of America Manufacturing, Inc. ("Honda of America"), located in Marysville, Ohio, which began manufacturing automobiles, motorcycles, engines and components in 1979;

(ii) Honda Power Equipment Manufacturing, Inc., located in Swepsonville, North Carolina, which began production of lawn mowers, lawn mower engines and automobile parts in 1984;

(iii) Nominal Defendant American Honda, a California corporation which was incorporated in 1959 and which maintains its principal place of business in Torrance, California; American Honda began importation, sales, marketing, service and distribution of Honda products in 1959;

(iv) Honda R&D North America, Inc. ("Honda R&D"), located in Torrance, California, which began research and development activities in 1975;

(v) Honda Engineering North America, Inc., located in Marysville, Ohio, which began development of manufacturing tools and systems for production facilities in 1988;

(vi) American Honda Finance Corporation, located in Torrance, California, which began providing wholesale and retail financing to Honda and Acura automobile, motorcycle and power equipment dealers and customers in the United States in 1980;

(vii) Honda Trading America Corporation, located in Torrance, California, which began importing and exporting raw materials, parts, components and commodities in 1972; and

(viii) Honda North America, Inc. ("Honda North America"), a New York corporation with its principal place of business located in Torrance, California, which began coordinating the operations of Honda's American subsidiaries in 1987.

(b) In the United States, which is the largest market for Honda's automobiles accounting for nearly 50% of Honda's net sales, outside Japan, American Honda markets Honda's products through a sales network consisting of approximately 1,300 independent local automobile dealers. American Honda's sales management organization consists of district sales managers, who are responsible for meeting the day-to-day needs of its automobile dealers; zone managers, who oversee the activities of district sales managers; Eastern and Western Regional Sales Managers, to whom the district sales managers report; and the Vice President and Senior Vice President of Sales, who are responsible for the entire American Honda sales network.

(c) In 1985, American Honda introduced a luxury line of automobiles to be marketed and sold under the trade name "Acura." At the same time, American Honda

created its Acura Division, which is responsible for marketing and selling its Acura line of automobiles, and its Honda Division, which is responsible for selling its Honda line of automobiles. That same year, Honda opened the first Acura automobile dealerships in the United States and the Acura network totaled approximately 300 dealerships at the end of fiscal year 1994.

(d) Honda's shares of common stock have been listed on the Tokyo Stock Exchange since 1957 and on each of the seven other stock exchanges located in Japan since 1958. Honda's shares have also been traded in the form of depositary shares on over-the-counter securities markets in the United States since 1962 and, since February 11, 1977, American Shares (each representing ten shares of Honda common stock and evidenced by ADRs), have been listed and traded on the New York Stock Exchange. ADRs representing American Shares are issued by Morgan Guaranty Trust Company of New York as depositary and the normal trading unit is 100 American Shares. As of March 31, 1994, Honda had issued 973,715,269 shares of common stock, of which 7,649,032 were represented by ADRs and 57,922,563 shares not represented by ADRs were owned by residents of the United States. The number of holders of ADRs was 12,710 as of March 31, 1994 and the number of holders of Honda shares of common stock in the United States was 187 as of the same date.

(e) As a foreign issuer whose securities are registered with the Securities and Exchange Commission ("SEC") for trading in the United States, Honda files periodic reports with the SEC on an annual and quarterly basis and more frequently in the case of material events.

Honda files reports with the SEC presenting financial information concerning it and its subsidiaries (including its wholly-owned United States-based subsidiaries identified in ¶8(a)(i) – (viii)) on a consolidated basis. Honda's investor relations officers located in the United States issues on behalf of Honda press releases, shareholder and ADR/stockholder reports on a regular basis.

C. The Director Defendants

9. (a) Honda's Articles of Incorporation provide for a Board of Directors consisting of not more than 45 members and not more than five Statutory Auditors. Under Japanese law, the Board of Directors has the ultimate responsibility for the administration of Honda's affairs. None of Honda's Directors are so-called "outside" directors but, rather, each one of them is an "insider" who is involved in the day-to-day operation and management of Honda's business and affairs. Honda's Directors and Statutory Auditors are elected at general meetings of shareholders. The normal term of office of a Honda Director is two years while that of a Statutory Auditor is three years; however, Directors and Statutory Auditors may serve any number of consecutive terms. Honda's Directors receive salaries as well as year-end bonuses based upon Honda's performance during that year. In addition, upon their retirement, each of Honda's Directors receives retirement allowance and a pension. Honda's Board of Directors elects a President and it may also elect one Chairman and one or more Executive Vice Presidents, Senior Managing Directors and Managing Directors from among its members. In addition, the Board of Directors may elect, pursuant to its resolutions, Representative

Directors who shall have authority individually to represent Honda generally in the conduct of its affairs.

(b) American Honda's Board of Directors consists of eight (8) Directors, four (4) of whom are members of Honda's Board of Directors. American Honda's Directors receive $2,000 per month for serving on its Board of Directors.

(c) The Director Defendants identified in ¶10(a) – (kk) of this Complaint served as Managing Directors, Representative Directors and/or Directors of Honda and/or American Honda at all times material to the shareholder derivative claims asserted herein.

10. (a) Defendant Nobuhiko Kawamoto is the President and a Representative Director of the Company. He was first elected as a Director of the Company in May 1981 and he was elected President and Representative Director in June 1990.

(b) Defendant Yoshihide Munekuni ("Munekuni") is a California resident and an Executive Vice President and a Representative Director of the Company. Munekuni was first elected as a Director of the Company in May 1984. At times relevant to this Complaint, he has served as American Honda's President and Chairman of its Board of Directors.

(c) Defendant Hiroyuki Yoshino is an Executive Vice President and a Representative Director of the Company. He was first elected as a Director of the Company in May 1983 and he was elected as a Representative Director of the Company in June 1990.

(d) Defendant Nobuyuki Otsuka is a Senior Managing Director and a Representative Director of the Company. He was first elected as a Director of the Company in May 1983 and he was elected as a Senior Managing Director and a Representative Director in June 1990.

(e) Defendant Masaru Miyata is a Senior Managing Director and a Representative Director of the Company. He was first elected as a Director of the Company in May 1986.

(f) Defendant Koichi Amemiya ("Amemiya") is a California resident and a Senior Managing Director and a Representative Director of the Company. Amemiya was first elected as a Director of the Company in May 1986. In June 1994, Amemiya was elected as Honda's Chief Operating Officer for the Regional Operations (the Americas). At times relevant to this Complaint, Amemiya has served as the President and a member of the Board of Directors of American Honda and Honda North America.

(g) Defendant Masaki Iwai is a Senior Managing Director and a Representative Director of the Company. He was first elected as a Director of the Company in May 1986.

(h) Defendant Hiroyuki Shimojima is a Managing Director of the Company. He was first elected as a Director of the Company in May 1987. In June 1994, he was elected as Chief Operating Officer for Automobile Operations.

(i) Defendant Takashi Matsuda is a Managing Director of the Company. He was first elected as a Director of the Company in May 1986.

(j) Defendant Koji Nagata is a Managing Director of the Company. He was first elected as a Director of the Company in May 1987. In June 1994, he was elected as Chief Operating Officer for Regional Operations (Asia and Oceania).

(k) Defendant Takeshi Yamada ("Yamada") is a Managing Director of the Company. He was first elected as a Director of the Company in May 1987. In June 1992, he was elected President and Director of Honda R&D and in June 1994 he was elected President and a member of the Board of Directors of America Honda.

(l) Defendant Tomohiko Nakano is a Managing Director of the Company. He was first elected as a Director of the Company in June 1988.

(m) Defendant Makoto Shino is a Managing Director of the Company. He was first elected as a Director of the Company in June 1988. In June 1994, he was elected Operating Officer for Japan Automobile Production for Regional Operations.

(n) Defendant Riku Iwai is a Managing Director of the Company. He was first elected as a Director of the Company in June 1989. In June 1994, he was elected Chief Operating Officer for Regional Operations (Japan) and Operating Officer for Japan Automobile Sales for Regional Operations.

(o) Defendant Yoshio Okawara is a Director of the Company. He was first elected as a Director of the Company in May 1987 and since July 1985 he has served as the Company's Advisor to Japan's Ministry for Foreign Affairs.

(p) Defendant Kazuo Ibuki is a Director of the Company. He was first elected as a Director of the Company in June 1991. He also serves as Chairman and Director of The Mitsubishi Bank, Limited.

(q) Defendant Tadashi Kume is a Director and Advisor of the Company. He was first elected as a Director of the Company in May 1979 and he was elected a Director and Advisor in June 1990.

(r) Defendant Takeo Fukui is a Director of the Company. He was first elected as a Director of the Company in June 1988. He also serves as Executive Vice President and Director of Honda of America.

(s) Defendant Ryuichi Tsukamoto is a Director of the Company. He was first elected as a Director of the Company in June 1989. In June 1994 he was elected President and Representative Director of Honda of the U.K. Manufacturing Limited.

(t) Defendant Katsuro Suzuki is a Director of the Company. He was first elected as a Director of the Company in June 1989. In June 1994 he was elected the Chief Operating Officer for Power Products Operations and Operating Officer for Japan Power Products Operations for Regional Operations.

(u) Defendant Michiaki Shinkai is a Director of the Company. He was first elected as a Director of the Company in June 1990. In June 1994 he was elected Chief Operating Officer for Business Support Operations (Human Resources, Administration, Public Relations and Information System) and Group Officer of Driving Safety Promotion Group.

(v) Defendant Michiyoshi Hagino is a Director of the Company. He was first elected as a Director of the Company in June 1990.

(w) Defendant Shinya Iwakura is a Director of the Company. He was first elected as a Director of the Company in June 1991.

(x) Defendant Isao Suzuki ("Suzuki") is a Director of the Company. He was first elected as a Director of the Company in June 1991. In October 1993 he was elected Executive Vice President and a member of the Board of Directors of American Honda.

(y) Defendant Kazue Ito is a Director of the Company. He was first elected as a Director of the Company in June 1992. In June 1994, he was elected Chief Operating Officer for Regional Operations (Europe, the Middle and Near East and Africa).

(z) Defendant Kunihiro Chujo is a Director of the Company. He was first elected as a Director of the Company in June 1992. In June 1994 he was elected Chief Operating Officer for Business Management Operations (Finance, Accounting and Affiliated Business).

(aa) Defendant Kentaro Kato is a Director of the Company. He was first elected as a Director of the Company in June 1992. In June 1994 he was elected Chief Operating Officer for Spare Parts Operations and Operating Officer for Spare Parts Operations for Regional Operations (Japan).

(bb) Defendant Kaname Kasai is a Director of the Company. He was first elected as a Director of the Company in June 1993. In June 1994 he was elected

General Manager of Suzuka Factory for Japan Automobile Production for Regional Operations.

(cc) Defendant Kensuke Fukatsu is a Director of the Company. He was first elected as a Director of the Company in June 1993. In June 1994 he was elected Chief Operating Officer for Motorcycle Operations and Operating Officer for Japan Motorcycle Operations for Regional Operations.

(dd) Defendant Takeo Matsumoto is a Director of the Company. He was first elected as a Director of the Company in June 1993. In June 1994 he was elected General Manager of Automobile Sales Division (Japan) for Japan Automobile Sales for Regional Operations.

(ee) Defendant Hirotada Komatsu is a Director of the Company. He was first elected as a Director of the Company in June 1994. In June 1994 he was elected General Manager of Purchasing Group and General Manager of Purchasing Group for Japan Automobile Production for Regional Operations.

(ff) Defendant Yuji Sakazume is a Director of the Company. He was first elected as a Director of the Company in June 1994. In June 1994 he was elected General Manager of Personnel Division for Business Support Operations (Human Resources, Administration, Public Relations and Information System).

(gg) Defendant Motoatsu Shiraishi is a Director of the Company. He was first elected as a Director of the Company in June 1994. In June 1994 he was also elected General Manager of Automobile Production Planning Office for Automobile Operations.

(hh) Defendant Minoru Harada is a Director of the Company. He was first elected as a Director of the Company in June 1994. In June 1994 he was also elected General Manager of Automobile Sales Division (Asia and Oceania) for Regional Operations.

(ii) Defendant Satoshi Aoki is a Director of the Company. He was first elected as a Director of the Company in June 1995.

(jj) Defendant Satoshi Toshida is a Director of the Company. He was first elected as a Director of the Company in June 1995.

(kk) Defendant Atsuyoshi Hyogo is a Director of the Company. He was first elected as a Director of the Company in June 1995. In June 1991 he was elected General Manager of North America Division (Automobiles) of Marketing & Sales Group (North America) of Automobile Operations (Marketing & Sales) for Automobile Operations. In June 1992 he was elected General Manager of North America Division (Automobiles) for Automobile Operations (North America).

D. The American Honda Defendants

11. (a) Pursuant to the multi-faceted fraudulent scheme described in this Complaint, many of the American Honda Defendants identified in ¶11(b) – (u) solicited, extorted, or paid bribes and kickbacks; others actively engaged in a cover-up designed to prevent the fraudulent scheme from being discovered or revealed. Many of the American Honda Defendants are California residents and, as detailed below, a number of them have already

pled (or been found) guilty of federal criminal charges arising out of the fraudulent scheme detailed herein:

(b) Defendant Billmyer, a resident of Raleigh, North Carolina, was employed by American Honda in sales and sales management positions during the period from September 1, 1970 to March 30, 1988. Billmyer was responsible for managing American Honda's sales force from September 1, 1983 to March 30, 1988, during which time he held various senior management titles, including Vice President – National Field Sales, Vice President – Auto Field Sales, and Senior Vice President – Auto Field Sales. During the period from January 1, 1985 through March 30, 1988, Billmyer's duties and responsibilities included American Honda's Acura Division and Honda Division. Billmyer was a member of American Honda's Board of Directors from approximately 1983 to at least March 1988 and he remained a member of its Board of Directors for some period of time after resigning as an officer of American Honda in March 1988. Evidence at his recently-concluded federal criminal trial in New Hampshire revealed that Billmyer extorted and/or received millions of dollars of bribes and kickbacks, including home mortgage payments, a swimming pool for his home, expensive suits and cash from Honda dealers. On June 1, 1995 Billmyer was convicted in the United States District Court for the District of New Hampshire on charges that he conspired to commit mail fraud as part of the wrongful scheme detailed in this Complaint.

(c) Defendant Stanley James Cardiges ("Cardiges"), a resident of Mission Viejo, California, was employed by American Honda during the period from September 12, 1977 to April 22, 1992 in various sales and

sales management positions. From April 1, 1984 to April 22, 1992, Cardiges was a senior member of American Honda's sales management, holding the positions of Assistant Vice President – Auto Field Sales, Vice President – Auto Field Sales and Senior Vice President – Auto Field Sales. During that period, Cardiges also served as a member of American Honda's Board of Directors. In late March 1988, Cardiges replaced Billmyer as head of the American Honda unit responsible for sales of Honda cars to dealers. From approximately 1980 to April 1992, defendant Cardiges, along with defendant Billmyer and other American Honda executives, determined the allocation of new Honda and Acura automobiles to Honda and Acura dealers located throughout the United States. From approximately March 1988 to April 1992, Cardiges also exercised decision-making authority in determining which applicants for Honda and Acura dealerships in the United States would receive such dealerships. From approximately 1980 to April 1992, Cardiges accepted almost $5 million in illegal bribes and kickbacks from Honda and Acura dealers, including mortgage payments on two homes, several new cars (including a $40,000 Mercedes Benz), an assortment of gold watches, shopping sprees in Hong Kong and a fur coat for his wife. Cardiges pled guilty to federal criminal charges, including violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, arising out of his acceptance of millions of dollars in bribes and kickbacks from Honda dealers. In August 1995 Cardiges was sentenced to five years in prison.

(d) Defendant Josleyn, a resident of Penn Valley, California, who is currently incarcerated at a federal

correctional facility located in Loveland, Colorado, was employed by American Honda in parts administration, sales and sales management positions during the period from January 4, 1983 to April 28, 1992. Evidence at his recently concluded federal court trial in New Hampshire revealed that Josleyn received hundreds of thousands of dollars in cash kickbacks from dealers and from an advertising company operated by his brother, defendant Gary D. Josleyn. On June 1, 1995 Josleyn was convicted in the United States District Court for the District of New Hampshire on conspiracy, mail fraud and racketeering charges arising out of the fraudulent scheme detailed in this Complaint, for which he is currently serving a prison sentence.

(e) Defendant Gary D. Josleyn ("Gary Josleyn"), a resident of Yorba Linda, California, is the owner of an advertising agency and the brother of defendant Josleyn. Gary Josleyn has pled guilty to federal criminal conspiracy charges related to the fraudulent scheme detailed in this Complaint.

(f) Defendant David L. Pedersen ("Pedersen"), a resident of Marietta, Georgia, was employed by American Honda in sales and sales management positions from July 5, 1979 to June 3, 1992. From January 1, 1985 to June 3, 1992, Pedersen was assigned to Honda America's Acura Division. In July 1994 Pedersen pled guilty to federal criminal charges related to the fraudulent scheme detailed in this Complaint and in August 1995 Pedersen was sentenced to two years in prison.

(g) Defendant Robert N. Rivers ("Rivers"), a resident of Rancho Mirage, California, was employed by

American Honda from July 10, 1979 to June 22, 1993 in various sales and sales management positions. From June 1, 1986 to June 22, 1993, Rivers was a senior member of Honda America's sales force, holding positions as Manager – Regional Sales, Senior Manager – Western Region, and Assistant to the Vice President/Senior Manager – Marketing Representative. Rivers has pled guilty to federal racketeering charges related to the fraudulent scheme detailed in this Complaint and, in August 1995 Rivers was sentenced to two years in prison.

(h) Defendant Roger Novelly ("Novelly"), a resident of Medford, New Jersey, was employed by American Honda in sales and sales management positions from February 2, 1981 to March 22, 1993, including the position of Zone Manager for the Northeastern United States Region. Novelly has pled guilty to federal criminal charges related to the fraudulent scheme detailed in this Complaint.

(i) Defendant Robert A. Mazzitelli ("Mazzitelli"), a resident of Atlanta, Georgia, was employed by American Honda in sales and sales management positions from May 17, 1982 to February 26, 1993, including the position of Zone Manager for the Southeastern United States Region. Mazzitelli has pled guilty to federal criminal conspiracy charges related to the fraudulent scheme detailed in this Complaint.

(j) Defendant Frederick W. Meis, Jr. ("Meis"), a resident of North Richmond Hills, Texas, was employed by American Honda in sales and sales management positions from March 15, 1983 until a recent (but unknown) date. Meis has pled guilty to federal criminal conspiracy

charges related to the fraudulent scheme detailed in this Complaint.

(k) Defendant Edward A. Temple ("Temple"), a resident of Destin, Florida, who is currently incarcerated at a federal correctional facility located in Atlanta, Georgia, was employed by American Honda in sales and sales management positions, including the position of Zone Manager for the Western Region, from February 16, 1983 to March 3, 1989. Temple has pled guilty to federal criminal conspiracy charges related to the fraudulent scheme detailed in this Complaint and in August 1995 Temple was sentenced to six months in prison, which he is currently serving.

(l) Defendant Hugh P. Cooper ("Cooper"), a resident of Wilmington, North Carolina, was employed by American Honda from April 1, 1983 to October 29, 1992 in sales and sales management positions, including the position of Zone Manager for the Mid-Atlantic Region. Cooper has pled guilty to federal criminal charges related to the fraudulent scheme detailed in this Complaint.

(m) Defendant Mark L. Benson ("Benson"), a resident of Camas, Washington, was employed by American Honda from September 1, 1984 to October 31, 1991 in sales and sales management positions, including the position of Assistant Zone Manager for the Northeast Region. Benson has pled guilty to federal mail fraud charges related to the fraudulent scheme detailed in this Complaint.

(n) Defendant Thomas A. Caulfield ("Caulfield"), a resident of Foothill Ranch, California, was

employed by American Honda from January 3, 1984 to May 19, 1992 in sales and advertising positions, including the position of Assistant Manager – Automobile Advertising. Caulfield has pled guilty to federal criminal conspiracy charges related to the fraudulent scheme detailed in this Complaint.

(o) Defendant Damien C. Budnick ("Budnick"), a resident of Florida, was employed by the Acura Division of American Honda from February 18, 1985 to January 16, 1991 as a sales representative. Budnick has pled guilty to federal criminal charges related to the fraudulent scheme detailed in this Complaint.

(p) Defendant Frank Pisano ("Pisano"), a resident of Littleton, Colorado, was employed by American Honda from September 4, 1979 to April 6, 1993 in sales and sales management positions, including the position of Zone Manager for the North Central Region. Pisano has pled guilty to federal criminal conspiracy charges related to the fraudulent scheme detailed in this Complaint.

(q) Defendant Beatrice Sikora ("Sikora"), a resident of Alpharetta, Georgia, was employed by American Honda from January 1973 to June 1993 in sales and sales management positions, including the position of Senior Traffic Assistant, in which capacity Sikora oversaw the vehicle allocation system which governed the distribution of Honda and Acura vehicles to dealerships located in various states. In June 1994 Sikora pled guilty to federal criminal conspiracy charges related to the fraudulent scheme detailed in this Complaint.

(r) John J. Conway ("Conway"), a resident of Saddle River, New Jersey, was employed by American Honda from October 3, 1977 to July 7, 1986 in sales and sales management positions, including the position of Regional Sales Manager for the Eastern Region from April 1, 1984 to July 7, 1986. In November 1994 Conway pled guilty to federal criminal conspiracy charges related to the fraudulent scheme detailed in this Complaint.

(s) Defendant Lyon & Lyon is a law partnership formed and existing under the laws of the State of California with its principal place of business located in the County of Los Angeles. At all times relevant to this Complaint, Lyon & Lyon served as general counsel to American Honda and certain of its partners also held positions as members of American Honda's Board of Directors.

(t) Defendant Roland N. Smoot ("Smoot") is a resident of Los Angeles, California. At all times relevant to this Complaint, Smoot was a partner in the law firm of Lyon & Lyon. From 1977 to 1986, defendant Smoot was a member of American Honda's Board of Directors. During that period, defendant Smoot was paid $2,000 per month by American Honda to serve on its Board of Directors; in addition, he served on the Internal Audit Committee of that board. From 1986 to 1989, Smoot served as Senior Vice President and General Counsel of Honda North America, during which period he maintained an office at Honda North America's headquarters in Torrance, California.

(u) Defendant James Short ("Short") is a resident of Los Angeles, California. At all times relevant to

this Complaint, Short was a partner in the law firm of Lyon & Lyon. In 1986, defendant Short succeeded defendant Smoot as a member of American Honda's Board of Directors; Short held that position until 1995. During that period, defendant Short was paid $2,000 per month by American Honda to serve on its Board of Directors.

E. The Defendants' Legal Duties

12. Each of the Director Defendants and the American Honda Defendants owed Honda, its public shareholders and ADR holders, and American Honda the duty to exercise due care and diligence in the management and administration of their affairs, as well as in the use and preservation of their property and assets. The wrongful conduct of the Director Defendants and the American Honda Defendants alleged in this Complaint involved violations of their obligations as directors and/or officers of Honda and/or American Honda, the absence of good faith on their part, as well as a reckless disregard for their duties to Honda, its public shareholders and ADR holders, and American Honda in which the Director Defendants and the American Honda Defendants were aware (or should have been aware) of a risk of serious injury to Honda and American Honda and transactions from which they obtained improper personal benefits. The wrongful conduct of the Director Defendants and the American Honda Defendants detailed in this Complaint has been ratified by Honda's Board of Directors.

13. To discharge their above-referenced legal duties, the Director Defendants and the American Honda Defendants were required to exercise reasonable and prudent

supervision over Honda's and American Honda's management, policies, practices, controls and financial affairs pursuant to their obligations to use care and diligence. The Director Defendants and the American Honda Defendants were required, among other things:

(a) To manage, conduct, supervise and direct the business and affairs of Honda and its wholly-owned subsidiaries, including American Honda, in good faith, carefully and prudently and in accordance with the laws of Japan, applicable United States and California laws, applicable state and federal rules and regulations, as well as Honda's and American Honda's charter and by-laws;

(b) To neither violate nor knowingly or recklessly permit any officer, director, or employee of Honda or American Honda to violate applicable United States and/or state laws, rules and regulations;

(c) To manage, conduct, supervise and direct the employees, businesses and overall affairs of Honda and American Honda in good faith and in accordance with applicable laws, rules and regulations, as well as their charter and by-laws;

(d) To exercise reasonable control and supervision over Honda's officers and the officers of its subsidiaries, including American Honda;

(e) To ensure the prudence and soundness of policies and practices undertaken or proposed to be undertaken by Honda and American Honda so as to preserve its earning power, property and assets;

(f) To remain informed as to the status of American Honda's operations and, upon receipt of notice or

information of imprudent or unsound practices, to make a reasonable inquiry in connection therewith and to take steps to correct such conditions or practices;

(g) To supervise and review the preparation, filing and/or dissemination of any SEC filings, press releases, audits, reports, proxy statements and/or other information required by law, and to examine and evaluate any reports or examinations, audits, or other financial information concerning Honda's financial condition;

(h) To establish and maintain systematic and accurate books and records of Honda's and American Honda's business and affairs and procedures for reporting its business and affairs to Honda's Board of Directors and to periodically investigate, or cause independent investigation to be made, of said books and records;

(i) To ensure that Honda was operated in a diligent, honest and prudent manner and that its wholly-owned subsidiaries, including American Honda, were operated in compliance with all applicable federal and state laws, rules and regulations and to ensure that Honda, by and through its subsidiaries, including American Honda, did not engage in any unsafe, unlawful, or unsound practices so that Honda and American Honda would not waste or be deprived of their corporate assets;

(j) To maintain and implement an adequate and functioning system of internal financial, accounting and management information systems in order that the value of Honda's and American Honda's assets would be safeguarded; and

(k) To refrain from obtaining personal benefit at the expense of Honda, its public shareholders and ADR holders, and American Honda.

14. By reason of their corporate positions and their ability to control Honda's and American Honda's business and corporate affairs at all relevant times, the Director Defendants and the American Honda Defendants owed Honda, its public stockholders and ADR holders, and American Honda obligations of candor, fidelity, trust and loyalty, and were required to use their ability to control Honda and American Honda in a fair, just and equitable manner, as well as to act in furtherance of Honda's (and its public stockholders' and ADR holders') best interests and not in furtherance of their own personal interests. In addition, each of the Director Defendants and the American Honda Defendants owed Honda and American Honda the duty to exercise due care and diligence in the management and administration of their affairs and in the use and preservation of their property and assets.

CONCERTED ACTION

15. At all times relevant to this Complaint, each of the Director Defendants pursued a common course of conduct, acted with, conspired with and/or aided and abetted one another to accomplish the wrongs and/or breaches of duties complained of herein. Similarly, at all times relevant to the causes of action asserted in this Complaint, each of the American Honda Defendants pursued a common course of conduct, acted with, conspired with and/or aided and abetted each other to accomplish

the wrongs and/or breaches of duties complained of herein.

16. Each of the Director Defendants aided and abetted and rendered substantial assistance in the accomplishment of the breaches of duties detailed in this Complaint. Similarly, each of the American Honda Defendants aided and abetted and rendered substantial assistance in the accomplishment of the wrongdoing and/or breaches of duties detailed in this Complaint. In taking the actions, as particularized herein, to aid and abet and substantially assist the commission of the breaches of duties and/or wrongdoing, each defendant acted with an awareness of and realized that his or her conduct would substantially assist its accomplishment and was aware of his or her overall contribution to and furtherance of the conspiracy, common enterprise and common course of conduct. Defendants' acts of aiding and abetting included, *inter alia*, all of the acts each of them are alleged to have committed in furtherance of the conspiracy, common enterprise and common course of conduct complained of herein, except those acts relating to the reaching of agreements or understandings sufficient to categorize their conduct as conspiratorial.

17. Each of the Director Defendants and the American Honda Defendants is liable as a direct participant in, an aider and abettor of and/or a co-conspirator with respect to the wrongdoing and/or breaches of duties complained of herein and each one had the power and influence to cause (and did cause) Honda and American Honda to engage in the conduct complained of herein.

DERIVATIVE ALLEGATIONS

18. Batchelder brings this shareholder action derivatively in the right of and for the benefit of Honda and American Honda to redress injuries suffered (and to be suffered) by them as a direct result of the violations of applicable Japanese law, United States law and/or California law and regulations, breaches of duty and corporate mismanagement, as well as the aiding and abetting thereof, by the Director Defendants and the American Honda Defendants. Honda and American Honda are named as Nominal Defendants in this Complaint solely in their derivative capacity. This is not a collusive action to confer jurisdiction on this Court which it would not otherwise have.

19. Batchelder will adequately and fairly represent the interests of Honda, its shareholders and ADR holders, and American Honda in enforcing and prosecuting their rights.

20. Pursuant to Japanese law, Batchelder has made the requisite written demand upon Honda's Statutory Auditor to bring this action more than 30 days prior to the filing of this Complaint but Honda did not institute this action or any claims against the defendants named herein. A copy of plaintiff's written demand to Honda is attached hereto as Exhibit A.

21. In accordance with Fed. R. Civ. P. 23.1 and § 800 of the California Corporations Code, Batchelder has not made a written demand upon American Honda's Board of Directors because making such a demand would be a futile and useless act for the following reasons:

(a) The majority of the current (or recent) members of American Honda's eight-member Board of Directors, including Director Defendants Amemiya, Munekuni, Yamada and Suzuki, American Honda Defendant Short, and Thomas Elliott and Chet Hale, engaged in, were aware of and/or recklessly disregarded the breaches of duties and/or wrongdoing detailed in this Complaint, but have taken no steps to remedy the damages sustained by American Honda;

(b) The acts complained of herein constitute violations of duties owed to Honda and American Honda and such acts are incapable of ratification;

(c) The acts complained of herein constitute violations of law and breaches of the duties owed by the Director Defendants and the American Honda Defendants and such acts are incapable of ratification;

(d) Two of the known principal wrongdoers and beneficiaries of the wrongdoing complained of herein (in particular, Director Defendants Amemiya and Munekuni) are in a position to, and do, dominate and control American Honda's Board of Directors; indeed, even though American Honda's Board of Directors is well aware of Amemiya's and Munekuni's direct, personal involvement in the fraudulent scheme detailed in this Complaint from public records and sworn testimony revealed in the above-referenced recent federal court criminal proceedings, the Board has taken no steps to discipline or seek any remedy against Amemiya and Munekuni; thus, the Board could neither exercise independent objective judgment in deciding whether to bring

this shareholder derivative action nor vigorously prosecute this action;

(e) Even though American Honda has incurred significant actual and/or potential liability due to the fraudulent scheme detailed herein, American Honda's Board of Directors has taken no action against the American Honda Defendants who engaged in that wrongful conduct in an effort to recover any part of the multi-million dollar damages American Honda has already suffered thereby;

(f) The acts complained of herein are wrongful and constitute a waste of Honda's and American Honda's property and assets and, thus, are acts incapable of ratification;

(g) The members of American Honda's Board of Directors cannot be relied upon to reach a truly independent decision as to whether to commence the demanded legal actions against the Board's current and/or recent members, and/or the American Honda Defendants who are responsible for the misconduct alleged in this Complaint, because, *inter alia*, American Honda's Board of Directors is totally dominated by Director Defendants Amemiya and Munekuni, to whose directives and views the Board has consistently acceded and will continue to accede. This domination of American Honda's Board of Directors by certain of the Director Defendants has impaired its ability to validly exercise its business judgment and rendered it incapable of reaching an independent decision as to whether or not to accept Batchelder's demand;

(h) In order to bring this action for breach of their legal duties, the members of American Honda's Board of Directors would be required to sue themselves and/or their fellow current and recent directors and allies in the top managerial ranks of American Honda, who are their good friends and with whom they have entangling financial alliances, interests and dependencies, which they would not do. Therefore, American Honda's Board of Directors would not be able to vigorously prosecute any such action;

(i) The members of American Honda's Board of Directors receive payments, benefits and other emoluments by virtue of their board membership and their control of American Honda. Thus, they have benefitted from the wrongdoing alleged herein and they have engaged in, tolerated and/or recklessly disregarded such wrongful conduct in order to preserve their positions of control and the perquisites thereof, and they are, therefore, incapable of exercising independent objective judgment in deciding whether or not to bring this shareholder derivative action. The members of American Honda's Board of Directors also have close personal and business ties with each other and they are, consequently, interested parties who cannot in good faith exercise independent business judgment to determine whether or not to bring this action against themselves; and

(j) The composition of American Honda's Board of Directors is designed to (and does) make them dependent upon and deferential to Director Defendants Amemiya and Munekuni and the rest of the Director

Defendants who, as a practical matter, control and dominate the process by which directors are selected for nomination or renomination to American Honda's Board of Directors. American Honda's Directors are paid large sums of money each year and after a Director has been an American Honda Director for several years, he is entitled to receive annual retirement benefits relating to his then-compensation. Thus, American Honda Directors with less than five years service are dependent upon the Director Defendants in order to obtain five years service and entitlement to lucrative retirement benefits. Directors with more than five years of service on American Honda's Board of Directors are also dependent upon the Director Defendants for renomination because each year of continued Board service entitles a member of American Honda's Board of Directors to additional retirement benefits.

22. In accordance with § 800 of the California Corporations Code, a copy of this Complaint was delivered to American Honda's corporate headquarters prior to its filing.

THE HONDA BRIBERY AND KICKBACK SCHEME

A. Introduction And Overview Of The Fraudulent Scheme

23. It has recently been revealed that from approximately 1980 to April 1992, Honda and American Honda were the victims of the largest commercial bribery scheme in United States history, involving over $15 million in bribes and kickbacks paid to Honda and American

Honda executives, including defendants Billmyer, Cardiges and Josleyn. Pursuant to this extensive and multifaceted fraudulent scheme, valuable property rights belonging to Honda and American Honda, including proprietary information as well as Honda and Acura automobile dealerships, were improperly awarded by American Honda executives in exchange for cash, gifts and other forms of illegal consideration. Moreover, during the 1980s and early 1990s, when American consumers paid thousands of dollars above the dealer's sticker price for popular Honda and Acura automobiles, including Honda Accords, Civics and Preludes, scarce vehicles were improperly awarded to dealers who gave Honda and American Honda executives expensive gifts, including Mercedes Benz automobiles, Rolex watches, swimming pools for their homes, jewelry for their wives, payment of college tuition for their children and envelopes filled with cash. Federal prosecutors have publicly stated that Honda and American Honda were the principal victims of this elaborate and lengthy multi-million dollar fraudulent scheme, a pronouncement which has repeatedly been endorsed by Honda's spokespersons.

24. This massive and long-lasting fraudulent scheme had several aspects. Among the forms of fraudulent and/or criminal conduct engaged in by the American Honda Defendants and causing injury to Honda and American Honda were the following aspects:

(a) Honda and American Honda executives accepted and/or extorted bribes and kickbacks from certain Honda and Acura dealers located throughout the United States in exchange for more favorable treatment,

such as increased allocations of preferred, popular, scarce and readily salable Honda and Acura automobiles;

(b) Honda and American Honda executives accepted and/or extorted bribes and kickbacks from certain Honda and Acura dealers located throughout the United States in exchange for allocation of "port" vehicles (*i.e.*, additional and discounted Honda and Acura automobiles which had been slightly damaged in transit) and sales of "brass hats" (*i.e.*, automobiles which had been used for a short time by Honda and American Honda executives or employees);

(c) Honda and American Honda executives accepted and/or extorted bribes and kickbacks in exchange for awarding or transferring Honda and Acura dealerships, which are also known as "dealer points" or "open points";

(d) Honda and American Honda executives accepted and/or extorted ownership interests in new and/or existing Honda and Acura dealerships or profits derived from their operations, in violation of Honda's and American Honda's conflict-of-interest policy;

(e) Honda and American Honda executives accepted and/or extorted bribes and kickbacks from vendors of sales training seminars provided to Honda and Acura dealers' salespeople;

(f) Honda and American Honda executives accepted and/or extorted bribes and kickbacks from vendors of advertising and marketing services provided to Honda and Acura dealers; and

(g) Honda and American Honda and the latter's general counsel, defendants Lyon & Lyon, Smoot and Short, conspired to obstruct justice by attempting to conceal such wrongdoing.

25. This massive and long-lasting fraudulent scheme has already cost Honda and American Honda millions of dollars as a direct result of lost corporate opportunities, the settlement of at least one dealer lawsuit, damage to their goodwill and business reputations and continuing relationships with their dealers, as well as costs amounting to millions of dollars incurred by Honda and American Honda for investigation and legal defense fees. In addition, Honda and American Honda face actual and potential multi-million dollar liability as a result of dozens of lawsuits pending in federal and state courts brought by Honda and Acura dealers who did not receive such favorable treatment.

B. American Honda's Car Allocation System

26. Beginning prior to the mid-1970s, Honda and American Honda marketed and sold Honda automobiles throughout the United States. Toward the end of that decade, consumer demand for new Honda automobiles increased dramatically and this trend continued into the 1980s and early 1990s.

27. As noted above, Honda and American Honda organized its sales force by dividing the United States into ten geographic sections called "zones" or "regions" and assigned specific geographic territories to individual Honda dealers. Each such dealer entered into a written dealership agreement with Honda and American Honda,

pursuant to which the dealer would operate its dealership and sell new Honda automobiles to the general public. Under the dealership agreement's terms and conditions, Honda and American Honda agreed to provide (and the dealers would purchase) new Honda automobiles for sale to the general public, with the amount of such vehicles to be determined according to an "allocation system," which was to be based upon the individual dealer's sales performance. From about 1979 to 1992, however, the public demand for new Honda automobiles was so strong that virtually every vehicle that a dealer received from Honda and American Honda could be sold to a consumer.

28. To determine new automobile allocations, the system devised by Honda and American Honda utilized two factors: the individual dealer's "rate of travel" and the dealer's average inventory. The rate of travel refers to the dealer's vehicle sales rate, expressed as the percentage of its allocation actually sold during a given time period; the average inventory refers to the number of unsold cars held in inventory by the dealer during that period. Thus, if a particular dealer had large numbers of unsold Honda automobiles held in inventory or allocated in transit from Honda's or American Honda's manufacturing plants, the allotment of additional new vehicles from Honda and American Honda would be lower; however, if no cars were currently being held in inventory, the dealer's allotment would be higher. This system provided an incentive for a dealer to increase its rate of travel and decrease its inventory so that it appeared that it had few or no cars at any particular time.

29. From 1980 to 1992, by paying bribes and kickbacks to Honda and American Honda executives, certain dealers managed to make it appear that they had accomplished a high rate of travel and a low inventory. As a result, in exchange for such illegal payments, these dealers were allocated increased number of new Honda automobiles which they could sell to the public. Other dealers who did not engage in such wrongful conduct necessarily received lesser allocations of newer vehicles.

C. American Honda's Policy Regarding Award Of Dealerships

30. American Honda employed written procedures for the establishment and award of new automobile dealerships which were designed to ensure that American Honda selected and approved the best dealer candidates in order to provide Honda with a successful and profitable dealer network. Before establishing a new dealership, American Honda required that a marketing study be conducted to determine whether the demographics, economic and competitive conditions, business climate, and state and local laws and regulations applicable in that region or locality would allow for a successful new dealership to be established. When the study indicated that a new dealership was warranted, American Honda would establish an "open point" for that particular location.

31. After designating an open point, American Honda would consider qualified candidates – preferably three or more – for the open point. Candidates seeking a dealership were required to complete a written application disclosing, among other things, their experience in

the automobile industry and the amount of capital available to establish and operate the dealership. American Honda sales representatives were required to interview and screen the applicants and to submit their recommendations to American Honda's national sales managers for final approval. Employees at all levels of American Honda's sales organization were to select and recommend new dealers who were best suited to own and operate a dealership in accordance with the best interests of Honda and its shareholders.

32. A potential dealer selected for an open point would receive a contract, known as a Letter of Intent ("LoI"), whereby American Honda agreed to execute a dealership agreement with that candidate if the latter satisfied various conditions within a specified period of time. The significance of American Honda's LoI was that during its term, no other individual could establish a competing dealership within the relevant geographic market. In other words, the LoI conferred upon the selected dealer the exclusive right to open a dealership within a specified geographic area, provided that the candidate satisfied all of the conditions set forth in the LoI. Upon fulfilling all of the terms and conditions set forth in the LoI, American Honda would enter into a Dealer Sales Agreement and issue a Dealer Number to the new dealer that would allow the latter to commence ordering new automobiles from Honda and American Honda for retail sale to consumers.

33. Such LoIs were American Honda's exclusive and valuable property and were to be issued solely for the benefit of Honda and American Honda; thus, transfer of an LoI by its original recipient required American

Honda's approval. LoIs for American Honda dealerships held substantial economic value because Honda and Acura automobiles were in high demand among consumers during the 1980s and early 1990s. It was Honda's and American Honda's policy that LoIs were to be awarded without any requirement that the dealer make any payment of money, or provision of any other thing of value, to American Honda or any of its employees, agents, representatives, or members of their families; however, from 1980 to 1992 the American Honda Defendants extorted, received, or paid bribes and kickbacks, including payments of cash or assignment of dealership profit participations, in exchange for awarding Honda and Acura dealerships to favored individuals.

D. American Honda's Conflict-Of-Interest Policy

34. American Honda's written policy prohibited its employees from any involvement in situations where their personal interests might conflict, or appear to conflict, with the interests of Honda and its public shareholders and ADR holders. American Honda's conflict-of-interest policy required its employees to deal with dealers, suppliers and other persons doing business (or seeking to do business) with American Honda in an impartial manner, without favor or preference, based strictly on the interests of Honda and its shareholders.

35. American Honda's conflict-of-interest policy expressly prohibited its employees, or members of their families, from seeking or accepting for their personal benefits any payments, gifts valued at $50 or more, or loans from any person or business that did or sought to

do business with Honda. This conflict-of-interest policy expressly prohibited its employees from owning, directly or indirectly, a significant financial interest in a dealership, or any other business entity that did or sought to do business with American Honda. The policy further expressly prohibited its employees from conducting business on behalf of Honda with a relative, or a business entity in which the employee or relative held an interest; however, from 1980 to 1992 the American Honda Defendants repeatedly and systematically violated the conflict-of-interest policy by extorting, receiving, or paying bribes and kickbacks in exchange for allocating new automobiles or dealerships to favored individuals.

E. Wrongful Allocation Of New Automobiles In Exchange For Payment Of Bribes And Kickbacks

36. During the period from approximately 1980 to 1992, the following Honda and/or Acura dealers paid bribes or kickbacks or improperly provided things of value to Honda and American Honda executives, including defendants Billmyer and Cardiges, in exchange for increased allocations of new Honda or Acura automobiles, including "port" vehicles and "brass hats":

(a) Bob Barbour paid $50,000 to $75,000 and gave a piano worth $20,000 to defendant Cardiges;

(b) Norman Braman paid a $20,000 gain on the sale of stock to defendant Cardiges;

(c) Don Carlton paid $100,000 to defendant Cardiges;

(d) In 1990-1991, Dave Conant paid $250,000 to defendant Josleyn and made several valuable gifts to defendants Cardiges and Rivers;

(e) John D'Elia paid $5,000 to defendant Cardiges;

(f) Angelo Falconi paid $550,000 to $1 million by granting certain American Honda executives, including defendants Rivers and Cardiges, a percentage of his dealerships and/or their profits;

(g) In 1981-1982, Clarence Fincher paid $10,000 to defendant Billmyer;

(h) In 1991, Bob Frink paid over $330,000 to defendants Cardiges and Josleyn;

(i) Douglas Griffith paid $6,200 to defendant Cardiges;

(j) In 1988, Rick Heinz paid $183,750 to defendant Cardiges;

(k) Jerry Herson gave gift certificates worth $6,000 to defendant Cardiges;

(l) Steve Howell paid $75,000 and gave several valuable gifts to American Honda executives;

(m) In the late 1980's, Henry Caccatorian ("Hank Torian") paid over $250,000 to defendants Rivers and Cardiges;

(n) Bob LaPointe gave a 1965 Mustang worth $3,000-$4,000 to defendant Cardiges;

(o) Don Lia paid more than $105,000 to defendant Cardiges;

(p) Martin Lustgarten paid more than $235,000 to defendants Rivers and Billmyer;

(q) David McDavid paid an unknown amount of cash and provided free airplane flights to American Honda executives;

(r) Tom O'Donnell gave defendant Cardiges a used Prelude valued at $12,000;

(s) William Paige gave a pickup truck worth $10,000 to defendant Cardiges;

(t) In 1988, Cliff Peck paid over $420,000 to defendants Temple, Cardiges and Meis;

(u) Al Piano paid $14,000 to defendant Cardiges;

(v) Vincent Piazza paid $20,000 to defendants Cardiges and Billmyer;

(w) George Poling gave a Honda Civic worth $12,000 to defendant Cardiges;

(x) Joe Pope paid $150,000 to defendant Rivers;

(y) Bob Quaid gave a Mitsubishi automobile worth $30,000 to defendant Cardiges;

(z) Vincent Radley paid $120,000 to defendant Cardiges;

(aa) Jack Robertson paid $12,000 to defendant Cardiges;

(bb) Scott Robinson paid $35,000 and gave gifts of automobiles and other valuable items to defendant Cardiges;

(cc) Bob Rosenthal paid more than $32,500 to defendant Cardiges;

(dd) John Rosatti paid $260,000 to defendants Cardiges and Billmyer;

(ee) W.R. (Rod) Ryan paid over $160,000 to defendants Billmyer, Cardiges, Finley and Novelly;

(ff) Fred Schneider paid up to $100,000 to defendant Cardiges;

(gg) Bill Schuiling paid $420,000 to defendant Cardiges;

(hh) Ed Smith paid $35,000 to defendant Cardiges;

(ii) Ted Stevens gave a swimming pool and landscaping worth $100,000 to defendant Cardiges;

(jj) John Stevenson gave vehicles worth $6,500 to defendant Cardiges;

(kk) Temple paid more than $300,000 to defendant Cardiges;

(ll) David Trainor paid over $250,000 to defendant Cardiges;

(mm) William Vince paid over $50,000 to defendants Billmyer, Cardiges and Novelly; and

(nn) Daniel Zeid and Don Neidringhaus paid more than $52,000 to defendant Rivers.

37. During the period from approximately 1980 to 1992, the improper allocation of new Honda and Acura automobiles to the above-referenced favored dealers who

paid bribes and kickbacks to Honda and American Honda executives injured Honda and American Honda because it damaged their goodwill and business reputation and prejudiced their relationships with their other Honda and Acura dealers who did not engage in such wrongful conduct. In addition, this aspect of the fraudulent scheme has exposed Honda and American Honda to multi-million dollar actual and potential liability in the form of settled and pending lawsuits brought by non-favored Honda and Acura dealers.

F. Wrongful Allocation Of Dealerships And Lois In Exchange For Payment Of Bribes, Kickbacks And Secret Ownership Shares In Honda And Acura Dealerships

38. From approximately 1980 to 1992, the American Honda Defendants, including defendants Billmyer and Cardiges, received and/or extorted bribes and kickbacks including, but not limited to, secret ownership interests in Honda and Acura dealerships, as well as the amounts listed below in exchange for improperly awarding American Honda LoIs relating to new dealerships to individuals who paid such sums:

Date	Dealership Location	Amount of Bribe
September 1988	Nanuet, NY	$ 42,000
October 1989	Moreno Valley, CA	$ 750,000
August 1991	Folsom, CA	$ 166,666
September 1991	Cocoa Beach, FL	$ 100,000
September 1991	Westerly, RI	$ 190,000

39. During the period from approximately 1980 to 1992, the improper allocation of Honda dealerships and

LoIs to persons who paid bribes and kickbacks or provided secret ownership interests in Honda and Acura dealerships to Honda and American Honda executives injured Honda and American Honda because it damaged its goodwill and business reputation and prejudiced its relationships with its other Honda and Acura dealers who did not engage in such wrongful conduct, and deprived Honda and American Honda of the services of potential dealers who were excluded from this dealership award process. In addition, this aspect of the fraudulent scheme has exposed Honda and American Honda to multi-million dollar actual and potential liability in the form of settled and pending lawsuits brought by non-favored dealers or potential dealers.

G. Diversion Of Honda Sales Training Seminar Funds

40. From approximately 1990 to 1992, Honda and American Honda executives, including defendants Cardiges, Rivers and Josleyn, caused Honda to agree to provide initial funding for sales training seminars to be offered to Honda and Acura salespersons and provided to them by outside vendors. Pursuant to this aspect of the fraudulent scheme, Honda and Acura dealers were pressured to pay an inflated fee of approximately $395 per salesperson for each sales training seminar attended.

41. After receiving such inflated fees from Honda and Acura dealers, the above-referenced vendors of the sales training seminars paid improper kickbacks to defendants Cardiges, Rivers and Josleyn totaling over $165,000.

42. This aspect of the fraudulent scheme injured Honda and American Honda because it damaged their

goodwill and business reputation and prejudiced their relationships with its other Honda and Acura dealers. In addition, this aspect of the fraudulent scheme has exposed Honda and American Honda to multi-million dollar actual and potential liability in the form of settled and pending lawsuits brought by Honda and Acura dealers or potential dealers.

H. Diversion Of Honda Advertising Funds

43. From approximately October 1990 to approximately July 1992, Honda and American Honda executives, including defendants Cardiges, Josleyn and Gary Josleyn, devised a scheme to defraud Honda and American Honda, as well as their dealers who were members of Honda dealer advertising associations, of monies which had been intended to pay for local Honda automobile advertising campaigns.

44. Under a program maintained by Honda during this period, Honda and American Honda matched funds with monies supplied by dealer advertising associations, with such combined funds to be used by the dealers to purchase direct mail, newspaper, radio and television advertising. As part of their fraudulent scheme, defendants Cardiges and Josleyn hired Bergmann & Associates ("Bergmann") to provide such advertising and marketing services to Honda, American Honda and its dealers. Honda and Acura dealers, acting through their dealer advertising associations, paid Bergmann for the advertising and marketing services, using their funds as well as the matching funds provided by Honda and American Honda.

45. Pursuant to this aspect of the fraudulent scheme, upon receiving such payments Bergmann paid kickbacks to American Honda executives, including defendants Cardiges and Josleyn, thereby depriving Honda, American Honda and its dealers of their monies. During 1991 and 1992, defendants Cardiges, Josleyn and other American Honda executives received kickbacks from Bergmann totaling more than $2.5 million.

46. This aspect of the fraudulent scheme injured Honda and American Honda because it deprived them of their monies, which were intended to pay for advertising and marketing services for Honda and Acura automobiles, and also damaged their goodwill and business reputation. In addition, this aspect of the fraudulent scheme has exposed Honda and American Honda to multi-million dollar actual and potential liability in the form of settled and pending lawsuits brought by Honda and Acura dealers.

THE DIRECTOR DEFENDANTS', LYON & LYON'S, SMOOT'S AND SHORT'S KNOWLEDGE OF, ACQUIESCENCE IN, AND/OR NEGLIGENCE IN FAILING TO UNCOVER THE FRAUDULENT SCHEME AND/OR PARTICIPATION IN ITS COVER-UP

47. It has been alleged in other proceedings and sworn testimony has been given that the multi-faceted fraudulent scheme detailed in this Complaint was open, notorious and widespread throughout American Honda and its executives from 1979 to 1992. As early as 1983, some of the Director Defendants were aware that American Honda executives were living well beyond their

means and incomes as a result of extorting and/or receiving bribes and kickbacks from Honda and Acura dealers; nevertheless, the Director Defendants allowed Honda and/or American Honda to continue to employ such executives in their positions at American Honda and failed to take effective steps to end such wrongdoing when it was within their duty, power and authority to do so.

48. Director Defendants Amemiya and Munekuni, who served as the highest ranking executives of American Honda during the period in question (and who continue to serve as Representative Directors and Executive Vice President and/or Senior Managing Director of Honda and members of American Honda's Board of Directors), knowingly approved, supported and/or affirmed the wrongful and illegal acts carried out by the American Honda Defendants. Director Defendants Amemiya and Munekuni knew of their executives' evident financial success, worked with them on a daily basis, witnessed their (and their families') conspicuous personal consumption of expensive clothing, jewelry and automobiles, and were often entertained in their lavish homes. Moreover, as part of the fraudulent scheme alleged in this Complaint, Director Defendant Amemiya solicited and received a Mercedes Benz automobile and a painting worth $50,000 from a Honda dealer and his girlfriend's automobile was serviced at no charge at the Honda dealership located in Torrance; Director Defendant Munekuni solicited and received expensive golf clubs from Honda dealers.

49. Acting within the scope of his authority as the President of American Honda, Director Defendant

Munekuni has knowingly participated in a conspiracy to cover-up the fraudulent scheme detailed in this Complaint since at least 1983. In the early 1980s, J.D. Power ("Power"), in his capacity as a well-known automobile market researcher and consultant hired by Honda, learned that certain American Honda executives were extorting and/or receiving bribes and kickbacks from Honda and Acura dealers in exchange for favored treatment in the allocation of new automobiles. In a letter dated March 14, 1983, Power related his concerns to Director Defendant Munekuni, who was then the Executive Vice President of American Honda. As a result of his 1983 letter, in 1983 and 1984 Power met with Director Defendant Munekuni (who was then the President of American Honda), Schmillen (who was then the Executive Vice President of American Honda), and defendant Smoot of Lyon & Lyon, who was general counsel to American Honda and a member of American Honda's Board of Directors. In his 1983 letter and during that meeting, Power warned these American Honda officers and directors about payments of bribes and kickbacks to American Honda executives by Honda and Acura dealers. When Director Defendant Munekuni subsequently questioned defendant Billmyer about Power's allegations, Billmyer told Munekuni that if Honda did not like the way he (Billmyer) was conducting American Honda's business, Honda could replace him. Notwithstanding the damaging information provided by Power in 1983 and 1984, Director Defendant Munekuni chose to retain Billmyer as Senior Vice President of American Honda because he wished to continue and/or cover-up the above-referenced illegal and fraudulent practices.

50. In 1979, American Honda Director and Executive Vice President Bill Schiuling ("Schiuling") acquired a 10% hidden ownership interest in a Honda dealership located in Auburn, California. Before acquiring the interest, Schiuling consulted with Lyon & Lyon partner (and American Honda board member) Smoot. (For 20 years – from the mid-1970s to the mid-1990s, defendant Lyon & Lyon had managerial responsibility, which it exercised in conjunction with American Honda's Human Resources Department, to investigate allegations of misconduct in American Honda's field sales organization, as well as alleged or apparent violations of its conflict of interest policy.) Defendant Smoot told Schiuling that the hidden ownership interest was acceptable as long as he (Schiuling) did not tell anyone.

51. Similarly, in late 1985 or early 1986 Honda dealer Tony Piazza ("Piazza") informed Tetsuo Chino ("Chino"), who was then the President of American Honda, that certain American Honda executives, including defendant Billmyer, were extorting and/or receiving bribes from Honda dealers. Piazza and Chet Hale, who was then a Senior Vice President of American Honda and a member of its Board of Directors (a position that he continues to hold), informed Chino in 1986 that Billmyer held secret ownership interests in Honda dealerships in violation of Honda's and American Honda's above-referenced conflict-of-interest policy. Between 1986 and 1988, Doug Divall, the head of American Honda's audit group, delivered similar warnings to Chino about a kickback scheme involving American Honda dealers.

52. On or about June 1, 1987, Cecil Proulx ("Proulx"), a mid-level managerial employee of American Honda,

delivered a letter to Lyon & Lyon partner (and American Honda Director) defendant Smoot warning him that steps must be taken to halt the payment of dealer "gifts" to American Honda executives. In the summer of 1987, Proulx also delivered a copy of his letter to Shige Yoshide, who was then Executive Vice President of Honda North America. Notwithstanding the charges leveled by Proulx, neither Smoot nor Lyon & Lyon took any steps to effectively investigate or end the extensive practice of bribes and kickbacks being paid to American Honda executives. In 1995, Proulx testified under oath in the above-referenced federal court criminal trial that he also brought his charges to the attention of Director Defendant Shinkai, who was then American Honda's Vice President of Administration, and that he (Proulx) asked Shinkai why Chino, who was then the President of American Honda, would not do anything to stop the payment of bribes and kickbacks to American Honda executives. Proulx testified that Shinkai told him that the payment of bribes and kickbacks was accepted or tolerated by Honda and American Honda because American Honda could not afford to pay its executives what competing automobile manufacturers would pay them and, accordingly, the dealers' payment of bribes and kickbacks provided a supplemental form of compensation that would be tolerated, if not encouraged.

53. In March 1991, American Honda Executive Vice President (and member of American Honda's Board of Directors) Tom Elliot ("Elliot") received a telephone call from Christian Walker ("Walker"), a Honda sales representative. During their telephone conversation, Walker told Elliot that he (Walker) had evidence that defendants

Cardiges and Rivers had accepted substantial amounts of money as bribes for awarding a Honda dealership to a certain person. Elliot referred Walker's charges to defendant Lyon & Lyon, American Honda's outside counsel, for investigation. During the following month (April 1991), Walker provided Lyon & Lyon attorney defendant Smoot with photocopies of bribe checks paid by Cliff Peck to defendants Cardiges and Temple in the amount of $162,500 in exchange for the award of a Honda dealership located in Conway, Arkansas, but Lyon & Lyon and Smoot took no steps to investigate the matter. In December 1991, following a meeting of American Honda's Board of Directors, Director Defendant Amemiya acknowledged to Elliot that substantial charges relating to payment of bribes and kickbacks had been made against defendant Cardiges and that he (Amemiya) was considering investigating the allegations. On January 30, 1992, however, Amemiya met with defendant Rivers and told him about Walker's allegations, but Amemiya also stated during his meeting with Rivers that "that is not important now" because "we have to concentrate on selling cars . . . our priority is sales." Needless to say, neither Amemiya nor Lyon & Lyon carried out any investigation of these charges.

54. Thus, it is clear that Director Defendants Munekuni, Amemiya and Shinkai were aware of the fraudulent scheme detailed in this Complaint years ago but, despite their awareness of the payment of numerous bribes and kickbacks to American Honda executives by Honda and Acura dealers, these Director Defendants have taken no effective steps to end such illegal and wrongful practices; nor have they caused Honda's Board

of Directors to do so. Indeed, the Director Defendants have failed to properly investigate such wrongdoing and, as noted above, neither Honda nor American Honda has taken any legal steps to recover the multi-million dollar damages sustained by them. In addition, with the assistance of defendants Lyon & Lyon, Smoot and Short, Director Defendants Munekuni, Amemiya and Shinkai have taken affirmative (and improper) steps to obstruct investigations and discovery initiated by Honda and Acura dealers who have filed lawsuits.

55. From 1979 to 1991, defendant Lyon & Lyon received but suppressed numerous complaints about the bribe and kickback scheme detailed in this Complaint; however, no action was taken by Lyon & Lyon, Smoot, or Short to investigate the charges or to cause American Honda's Board of Directors to end such corrupt practices. In 1992, when revelations in the above-referenced dealer lawsuit in new Hampshire compelled American Honda to conduct an internal investigation, Lyon & Lyon improperly delegated the task to Shelly Cameron ("Cameron"), an employee of American Honda's Human Resources Division who was unqualified to conduct such an investigation. During the period from February to April 1992, when even Cameron's incompetent investigation turned up evidence of bribes and kickbacks (so pervasive was the corruption at American Honda), Lyon & Lyon not only covered up its existence but its attorneys permitted American Honda executives to testify falsely and misleadingly in then-pending dealer lawsuits that the widespread reports of bribes and kickbacks were non-existent. Lyon & Lyon attorneys permitted defendant Novelly to

give false and misleading testimony in May 1992; permitted American Honda Senior Vice President Takeo Okusa to give false and misleading testimony in June 1992; permitted American Honda corporate representative Daniel Crowe to give false and misleading testimony in June 1992; and permitted defendant Cooper to give false and misleading testimony in October 1992. In February 1993, Lyon & Lyon attorneys falsely asserted to United States District Judge Steven McAuliffe of the District of New Hampshire that it had fully disclosed the results of the above-referenced internal investigation conducted in 1992.

56. Defendant Lyon & Lyon prepared (or assisted in the preparation of) high-ranking Honda and American Honda executives for depositions or other forms of testimony in legal proceedings. Defendant Cardiges testified in the above-referenced criminal trial that while being prepared to give testimony in federal court in 1982, defendant Smoot told him that if he (Cardiges) got on the witness stand and said something that was not true "that a bolt of lightning wasn't going to come out of the sky and strike him dead." Cardiges also testified that on several other occasions, including American Honda sales meetings, defendant Smoot told him and other American Honda employees that "if you get on the stand and don't tell the truth, lightning isn't going to strike you dead." Similarly, defendant Conway testified that at a formal sales meeting among American Honda's sales executives and district sales managers in the early 1980's that a Lyon & Lyon attorney advised the assembled group that if they lied while on the witness stand, "and a bolt of lightning should come down, it will not strike you down if you

lie." United States Chief District Judge Joseph A. DiClerico, Jr., of the District of New Hampshire, who sat as presiding judge in the criminal case, determined that the actions of Lyon & Lyon attorneys were intended to cause witnesses to be purposefully evasive during deposition testimony.

FIRST CAUSE OF ACTION

(Derivative Claim For Intentional Breach Of Duties)

57. Batchelder incorporates by reference Paragraphs 1 through 56 of this Complaint as though set forth at length herein.

58. The Director Defendants and the American Honda Defendants are Managing Directors, Representative Directors, Directors and/or officers of Honda and/or American Honda and, therefore, owe to them the duty to conduct their business affairs loyally, faithfully, carefully, diligently and prudently. These claims are asserted based upon the Director Defendants' and the American Honda Defendants' wrongful acts in violation of Japanese and/or California corporate law, which acts constitute breaches of duty to Honda, its public shareholders and ADR holders, and American Honda.

59. In their roles as officers and directors of Honda and/or its wholly-owned subsidiaries, including American Honda, the Director Defendants and the American Honda Defendants participated in the acts of mismanagement alleged herein, or acted in reckless disregard of the facts known to them. Notwithstanding their awareness of the facts alleged herein by reason of the above-referenced guilty pleas and convictions, including the fact that

bribes and kickbacks were being extorted, received and/or paid by many of the American Honda Defendants, the Director Defendants have done nothing to seek legal redress from the wrongdoers identified herein and they have thereby breached their duty of care, loyalty and accountability to Honda, its public shareholders and ADR holders, and American Honda by failing to act with appropriate care.

60. The Director Defendants' and the American Honda Defendants' wrongful conduct, as alleged in this Complaint, has also caused damage to Honda's and American Honda's goodwill and business reputation due to the negative adverse publicity that their actions have generated and they have impaired Honda's ability to raise capital at a reasonable and/or low cost because Honda's credit rating has been adversely affected and its cost of capital has, therefore, necessarily increased.

61. Each of the Director Defendants and the American Honda Defendants, acting individually and in concert, engaged in the above-referenced wrongful conduct in intentional breach and/or reckless disregard of their duties to Honda and American Honda. By reason of the foregoing wrongful conduct, the Director Defendants and the American Honda Defendants have breached their obligations to Honda, its public shareholders and ADR holders, and American Honda.

62. Honda, its public shareholders and ADR holders, and American Honda have been injured by reason of the Director Defendants' and the American Honda Defendants' intentional breach and/or reckless disregard of their duties. Batchelder, as a Honda shareholder, ADR

holder and representative, seeks damages in an amount not presently ascertained, but at least $15 million, as well as other relief on behalf of Honda and American Honda as set forth in the Prayer for Relief which follows.

SECOND CAUSE OF ACTION

(Derivative Claim For Grossly Negligent Breach Of Duties)

63. Except to the extent that they allege intentional or reckless misconduct by any of the Director Defendants or American Honda Defendants, Batchelder incorporates by reference and realleges Paragraphs 1 through 62 of this Complaint as though set forth at length herein.

64. The Director Defendants and the American Honda Defendants engaged in the above-referenced wrongful conduct without exercising the reasonable and ordinary care owed to Honda, its public shareholders and ADR holders, and American Honda by its directors, officers and employees and were grossly negligent in their conduct.

65. Honda, its public shareholders and ADR holders, and American Honda have been injured by reason of the Director Defendants' and the American Honda Defendants' grossly negligent breaches of their duties. Batchelder, as a Honda shareholder, ADR holder and representative, seeks damages in an amount not presently ascertained, but at least $15 million, as well as other relief on behalf of Honda and American Honda as set forth in the Prayer for Relief which follows.

THIRD CAUSE OF ACTION

(Derivative Claim For Waste Of Corporate Assets)

66. Batchelder incorporates by reference and realleges Paragraphs 1 through 65 of this Complaint as though set forth at length herein.

67. The fraudulent scheme detailed in this Complaint, including the payment and/or receipt of bribes and kickbacks by many of the American Honda Defendants, resulted in the waste of corporate assets belonging to Honda and American Honda.

68. As a result of the foregoing, Honda, its public shareholders and ADR holders, and American Honda have been damaged in an amount not presently ascertained, but at least $15 million, as well as other relief as set forth in the Prayer for Relief which follows.

FOURTH CAUSE OF ACTION

(Derivative Claim For Abuse Of Control)

69. Batchelder incorporates by reference and realleges Paragraphs 1 through 68 of this Complaint as though set forth at length herein.

70. The Director Defendants' and the American Honda Defendants' wrongful conduct constituted an abuse of their ability to control and influence Honda and American Honda, for which they are legally responsible.

71. By reason of the foregoing, Honda, its public shareholders and ADR holders, and American Honda

have been damaged in an amount not presently ascertained, but at least $15 million, as well as other relief as set forth in the Prayer for Relief which follows.

FIFTH CAUSE OF ACTION

(Derivative Claim For Constructive Fraud)

72. Batchelder incorporates by reference and realleges Paragraphs 1 through 71 of this Complaint as though set forth at length herein.

73. As a result of the wrongful conduct described above, the Director Defendants and the American Honda Defendants have committed and/or aided and abetted the commission of numerous misrepresentations to and/or concealed material facts from Honda, its public shareholders and ADR holders, and American Honda, despite the Director Defendants' and the American Honda Defendants' duties to, *inter alia*, disclose the true facts regarding their stewardship of their true intentions and, thus, they have committed and/or aided and abetted constructive fraud.

74. For the purpose of maintaining and further entrenching themselves in their positions of power, prestige and profit and control at Honda and American Honda and in order to conceal their wrongdoing and continue to receive the substantial benefits and salaries associated with their positions, and with the intent to deceive Honda, its public shareholders and ADR holders, and American Honda, the Director Defendants and the American Honda Defendants employed the above-referenced scheme and conspiracy to defraud. As a part of this

scheme and conspiracy, the Director Defendants and the American Honda Defendants actively made or concealed and/or participated in the making of, or aided and abetted the making or participation of the concealment, numerous omissions and misrepresentations of facts to Honda, its public shareholders and ADR holders, and American Honda. Said representations and statements were untrue and the Director Defendants and the American Honda Defendants did not believe them to be true when made, or knowingly, willfully, and/or intentionally made them without regard to their truthfulness, and/or aided and abetted the making of said misrepresentations. Said acts by the Director Defendants and the American Honda Defendants were fraudulent, oppressive, despicable and malicious.

75. As a direct and proximate result of the foregoing, Honda, its public shareholders and ADR holders, and American Honda reasonably relied upon the honesty and integrity of the Director Defendants and the American Honda Defendants as corporate officers and directors and were induced to act upon such misrepresentations, and have been damaged, entitling them to recover both compensatory and punitive damages in this action.

76. By reason of the foregoing, Honda, its public shareholders and ADR holders, and American Honda have sustained, and will continue to sustain, irreparable injury for which they have no adequate remedy at law, and are also entitled to an award of punitive damages against the Director Defendants and the American Honda Defendants.

77. By reason of the foregoing, Honda and American Honda have been damaged in an amount not presently ascertained, but at least $15 million, as well as other relief as set forth in the Prayer for Relief which follows.

SIXTH CAUSE OF ACTION

(Derivative Claim For Gross Mismanagement)

78. Batchelder incorporates by reference and reallege Paragraphs 1 through 77 of this Complaint as though set forth at length herein.

79. As detailed in this Complaint, the Director Defendants and the American Honda Defendants had a duty to Honda, its public shareholders and ADR holders, and American Honda to prudently supervise, manage and control American Honda's operations.

80. The Director Defendants and the American Honda Defendants, by their wrongful actions, either directly or through aiding and abetting, abandoned and abdicated their responsibilities and duties with regard to prudently managing Honda's and American Honda's assets in a manner consistent with the operations of a publicly-held corporation.

81. By acting as alleged herein, the Director Defendants and the American Honda Defendants breached their duties of due care and diligence in the management and administration of Honda's and American Honda's affairs and in the use and preservation of their assets.

82. By reason of the foregoing, Honda and American Honda have been damaged in an amount not presently ascertained, but at least $15 million, as well as other relief as set forth in the Prayer for Relief which follows.

SEVENTH CAUSE OF ACTION

(Violations of Section 14(a) of the Exchange Act and SEC Rule 14a-9)

83. Batchelder incorporates by reference and realleges Paragraphs 1 through 82 of this Complaint as though set forth at length herein. Batchelder asserts this claim against the Director Defendants only.

84. Batchelder asserts this claim under § 14(a) of the Exchange Act, 15 U.S.C. § 78n(a), and Rule 14a-9 promulgated thereunder by the SEC, 17 C.F.R. § 240.14a-9, in connection with Honda's Notice of Convocation of the 71st Ordinary General Meeting of Shareholders dated June 12, 1995 ("Proxy Materials"), issued and disseminated to holders of Honda's common stock and ADRs to solicit proxies for votes at the general meeting of stockholders to be held in Tokyo, Japan, on June 29, 1995.

85. Under § 14(a) of the Exchange Act, it is unlawful to solicit proxies in contravention of "such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78n(a). SEC Rule 14a-9 provides in pertinent part that "[n]o solicitation subject to this regulation shall be made by means of any proxy statement- . . . which, at the time . . . it is made, is false or misleading with respect to any material fact, or which omits to state

any material fact necessary in order to make the statements therein not false or misleading." 17 C.F.R. § 240.14a-9.

86. Among the stated purposes of the general meeting of stockholders conducted by Honda in June 1995 was to approve the proposal for appropriation of retained earnings for the fiscal year and the election of 19 Honda Directors. The Proxy Materials purported to state the qualifications of each of the Directors who were being presented to the shareholders for reelection. In connection therewith, the Proxy Materials were false and misleading because they failed to disclose the following material facts:

(a) That at least 24 persons, including several high-ranking executives of American Honda, had pled guilty or been found guilty of federal criminal charges arising out of the fraudulent scheme detailed in this Complaint;

(b) That one or more of the Director Defendants, as well as Honda and/or American Honda, had been named as defendants in the above-referenced pending lawsuits brought by Honda dealers in federal and state courts in California and other states;

(c) That one or more of the Director Defendants had solicited and/or received bribes as part of the fraudulent scheme and that one or more of the Director Defendants had actively participated in the effort to cover-up the fraudulent scheme detailed herein; and

(d) That one or more of the Director Defendants were guilty of breaches of trust, dishonesty, deceit and/or

self-dealing which inured to their direct, personal benefit because they directly participated in or acquiesced in their fellow Director Defendants' participation in the wrongdoing alleged herein.

87. As a result of omitting the above-referenced material facts from the Proxy Materials, which information was material to a Honda shareholder's informed exercise of the suffrage process, the Director Defendants have violated § 14(a) of the Exchange Act and SEC Rule 14a-9, thereby leading Honda's shareholders to vote in favor of the election and/or reelection of many of the Director Defendants.

PRAYER FOR RELIEF

WHEREFORE, Batchelder demands judgment on behalf of Honda and American Honda as follows:

1. Against each of the Director Defendants and the American Honda Defendants for damages in favor of Batchelder on behalf of Honda and American Honda, and awarding punitive and exemplary damages as appropriate, plus pre-judgment interest;

2. Awarding Batchelder the costs and disbursements of this shareholder derivative action, including reasonable attorneys', accountants', and experts' fees;

3. Awarding Batchelder post-judgment interest;

4. Granting equitable relief in the form rescinding the June 1995 election and re-election of some of the Director Defendants by false and misleading proxy materials; and

5. Granting such other and further relief as this Court may deem just and proper.

JURY DEMAND

Batchelder hereby demands a trial by jury.

DATED: February 23, 1996

MILBERG WEISS BERSHAD
HYNES & LERACH
WILLIAM S. LERACH
600 West Broadway, Suite 1800
San Diego, CA 92101
Telephone: 619/231-1058

MILBERG WEISS BERSHAD
HYNES & LERACH
KEVIN P. RODDY

/s/ Kevin P. Roddy
KEVIN P. RODDY

355 South Grand Avenue
Suite 4170
Los Angeles, CA 90071
Telephone: 213/617-9007

ROSSBACHER & ASSOCIATES
HENRY H. ROSSBACHER

/s/ Henry H. Rossbacher
HENRY H. ROSSBACHER

Union Bank Plaza, 24th Floor
445 South Figueroa Street
Los Angeles, CA 90071
Telephone: 213/895-6500

Attorneys for Plaintiff
Harry Batchelder

APPENDIX D

15 U.S.C. § 78n(a) provides:

> It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78l of this title.

California Corporations Code § 800(b)(1) provides:

> (b) No action may be instituted or maintained in right of any domestic or foreign corporation by any holder of shares or of voting trust certificates of the corporation unless both of the following conditions exist:
>
> (1) The plaintiff alleges in the complaint that plaintiff was a shareholder, of record or beneficially, or the holder of voting trust certificates at the time of the transaction or any part thereof of which plaintiff complains or that plaintiff's shares or voting trust certificates thereafter devolved upon plaintiff by operation of law from a holder who was a holder at the time of the transaction or any part thereof complained of. . . .

Federal Rules of Civil Procedure 23.1 provides:

> In a derivative action brought by one or more shareholders or members to enforce a right

of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

17 C.F.R. § 240.3a12-3(a)&(b) provides:

(a) Securities for which the filing of registration statements on Form 18 [17 CFR 249.218] are authorized shall be exempt from the operation of sections 14 and 16 of the Act.

(b) Securities registered by a foreign private issuer, as defined in Rule 3b-4 (§ 240.3b-4 of this

chapter), shall be exempt from sections 14(a), 14(b), 14(c) 14(f) and 16 of the Act.

17 C.F.R. § 240.14a-9 provides in pertinent part:

(a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

(b) The fact that a proxy statement, form of proxy or other soliciting material has been filed with or examined by the Commission shall not be deemed a finding by the Commission that such material is accurate or complete or not false or misleading, or that the Commission has passed upon the merits of or approved any statement contained therein or any matter to be acted upon by security holders. No representation contrary to the foregoing shall be made.

17 C.F.R. § 240.3b-4 (b) & (c) provides:

(b) The term foreign issuer means any issuer which is a foreign government, a national of any foreign group or a corporation or other organization incorporated or organized under the laws of any foreign country.

(c) Foreign private issuer: The term "foreign private issuer" means any foreign issuer other than a foreign government except an issuer meeting the following conditions: (1) More than 50 percent of the outstanding voting securities of such issuer are held of record either directly or through voting trust certificates or depositary receipts by residents of the United States; and (2) any of the following: (i) The majority of the executive officers or directors are United States citizens or residents, (ii) more than 50 percent of the assets of the issuer are located in the United States, or (iii) the business of the issuer is administered principally in the United States. For the purpose of this paragraph, the term "resident," as applied to security holders, shall mean any person whose address appears on the records of the issuer, the voting trustee, or the depositary as being located in the United States.

Article 267 of the Japanese Commercial Code provides:

1. Any shareholder who has held a share continuously at least for the last six months may demand, in writing, that the stock company institute an action to enforce the liability of directors.

2. If the stock company has failed to institute such action within thirty days from the date on which the demand referred to in the preceding paragraph was made, the shareholder referred to in the preceding paragraph may institute such action on behalf of the company.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-1414

In Re: MARK A. BROOKS,

Petitioner.

No. 98-1415

In Re: AMERICAN HONDA
MOTOR COMPANY, INC.;
HONDA NORTH AMERICA, INC.;
KOICHI AMEMIYA,

Petitioners.

ORDER

Mark A. Brooks and American Honda Motor Company, Inc. ("American Honda"), Honda North America, Inc. ("HNA"), and Koichi Amemiya (collectively, "Honda") have moved for a stay of an order entered by the district court pending further appellate review. Pursuant to F.R.A.P. 8(a), in view of the shortness of time, I have considered the motions for stay as a single judge. Both Brooks' and Honda's motions for stay are denied.

Raising essentially the same questions, they are consolidated.

I.

The instant applications for relief arise out of litigation brought by various Honda automobile dealers against American Honda, HNA, and other defendants. The dealers have alleged that former employees of American Honda accepted gratuities from other dealers in exchange for favorable treatment in the allocation of automobiles and award of new dealer locations. The cases were consolidated for pre-trial proceedings pursuant to an order from the Judicial Panel on Multi-District Litigation under 28 U.S.C. § 1407, dated August 1, 1995. Brooks, though an HNA employee, is not a defendant in the consolidated cases and has been lead in-house counsel for HNA in the litigation since its inception.

In November 1997, the lead plaintiffs filed a motion to set aside the attorney-client and work product privileges with respect to all communications on the subject of gratuities among American Honda, HNA, and any of their attorneys, including both outside and in-house counsel, between 1979 and June 1993. The plaintiffs maintained that the crime-fraud exception vitiated the privileges asserted by Honda.

On December 19, 1997, after briefing by both parties, the district court held a hearing on the plaintiffs' motion to set aside the privilege. Subsequent correspondence led the district court to approve a proposal suggested by American Honda under which American Honda agreed: (1) to permit discovery of all facts relating to gratuities

that were communicated between American Honda and outside counsel during the relevant time period; (2) to produce to the court *in camera* documents regarding legal advice given to American Honda by its lawyers; and (3) to advise the court by April 3, 1998 whether American Honda intended to rely on the defense of advice of counsel at trial so as to render moot some of the claims of privilege.

On March 2, 1998, American Honda informed the district court that it had provided the plaintiffs with all documents for which American Honda had voluntarily waived the attorney-client and work product privileges. American Honda asserted that, following production, only a "handful" of written communications between outside counsel and American Honda on the subject of dealer gratuities remained undisclosed. American Honda described the documents that it was submitting to the court *in camera*, including investigative files created at the direction of outside counsel.

On March 10, 1998, after reviewing the documents submitted to the court *in camera*, the district court granted the plaintiffs' motion to set aside the attorney-client privilege and, with specified limitations, work product privilege based on the crime-fraud exception. The district court ordered production of all communications with and all work product of specified outside counsel and in-house counsel relating to gratuities for the 13½ years between 1979 and June 1993. The order encompasses a limited number of documents between various persons and Brooks, who became a Honda employee only in 1990.

Honda and Brooks submitted independent correspondence to the district court, each seeking consideration of certain specific issues relating to the court's ruling on the issue of privilege. Honda alternatively requested a stay to permit appellate review in this court. At a telephonic hearing on March 20, 1998, the district court reaffirmed the earlier ruling and granted a stay until Tuesday, March 24, 1998 at 12:00 p.m. to permit Honda and Brooks to seek relief from this court.

II.

Four factors govern the decision whether to stay an order pending further appellate review: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Neither Brooks nor Honda has made the requisite "strong showing" of a likelihood of success on the merits.

The plaintiffs have contended that the crime-fraud exception vitiates the attorney-client and work product privileges with respect to all communications among American Honda, its in-house counsel, and outside counsel on the subject of gratuities between 1979 and June 1993. According to the plaintiffs' detailed allegations, Honda did not employ counsel to obtain legitimate legal advice on the subject of gratuities, but rather did employ counsel to assist, whether knowingly or unwittingly, in the wrongful concealment of evidence of bribery.

The attorney-client and work product privileges do not shield from disclosure information given or received in furtherance of a crime or fraud. *In re Grand Jury Proceedings*, 102 F.3d 748, 750-51 (4th Cir. 1996); *In re Grand Jury Proceedings*, 33 F.3d 342, 348-49 (4th Cir. 1994). Applicability of the crime-fraud exception does not depend on the attorney's knowing participation in the client's crime or fraud: "the concealment or cover-up of its criminal or fraudulent activities by the client, . . . rather than the attorney's lack of knowledge of the criminal or fraudulent activity or activities of the client, controls the court's analysis." *In re Grand Jury Proceedings*, 102 F.3d at 751 (citation omitted).

To establish the applicability of the crime-fraud exception, the party attempting to overcome the privilege must make a *prima facie* showing that the communications sought fell within the crime-fraud exception. *In re Grand Jury Proceedings*, 33 F.3d at 349; *In re Grand Jury Subpoena*, 884 F.2d 124, 127 (4th Cir. 1989). " '[W]hile a *prima facie* showing need not be such as to actually prove the disputed fact, it must be such as to subject the opposing party to the risk on non-persuasion if the evidence as to the undisputed fact is left unrebutted.' " *In re Grand Jury Proceedings*, 33 F.3d at 352 (quoting *Duplan Corp. v. Deering Milliken, Inc.*, 540 F.2d 1215, 1220 (4th Cir. 1976)).

After careful consideration of the parties' written and oral submissions, I discern no error in the district court's finding that the plaintiffs made a strong *prima facie* showing that American Honda's purpose in consulting counsel on the subject of gratuities was not to obtain legitimate legal advice, but fraudulently to conceal evidence of bribes. Given the fundamental illegitimacy of Honda's

purpose in consulting counsel on the topic of gratuities, the breadth of the district court's order was not unjustified. Based on the evidence before it, the district court reasonably concluded that the communications between American Honda and its counsel, including Brooks, in their entirety, furthered American Honda's fraudulent design.

Honda's assertion that the district court was required to review each allegedly privileged communication *in camera* before ordering disclosure is without merit. This court has explained:

> Under *Zolin*, the decision to review the allegedly privileged documents *in camera* is one within the district court's discretion: "Once that threshold showing is made, the decision whether to engage in *in camera* review rests in the sound discretion of the district court."

In re Grand Jury Proceedings, 33 F.3d at 350 (quoting *United States v. Zolin*, 491 U.S. 554, 572 (1989)).

Moreover, I find no merit in Honda's contention that it had insufficient opportunity to rebut the plaintiffs' case. The privilege question was fully briefed and argued before the district court.

In sum, Brooks and Honda have failed to demonstrate a reasonable likelihood of success on the merits. The apparent breadth of American Honda's design to enlist the assistance, knowing or otherwise, of its attorneys in concealing evidence of gratuities supports the district court's finding that the privileges asserted in the instant case are negated by the crime-fraud exception.

Therefore, Brooks' and Honda's motions for stay are DENIED.

/s/ Francis D. Murnaghan, Jr.
Francis D. Murnaghan, Jr.
United States Circuit Judge

March 24, 1998

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE: AMERICAN HONDA MOTOR COMPANY, INC. DEALER RELATIONS LITIGATION	* * * * *	MDL Case No. 1069

* * *

OPINION

Presently pending before me is plaintiffs' motion to compel the production of two memoranda to file written by Richard A. Gargiulo, one of the attorneys representing American Honda during "proffer meetings" held in New Hampshire with members of the U.S. Attorney's Office and FBI agents on October 6, 1993, and October 8, 1993. The memoranda record what occurred at the meetings. Defendants have declined to produce the memoranda on the grounds that they are protected by the attorney/client privilege and that they constitute attorney work product. Plaintiffs argue that they have established a *prima facie* case that the crime/fraud exception applies and that the documents should therefore be produced. I have reviewed the two memoranda *in camera*. I agree with plaintiffs' position and will grant their motion.[1]

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[1] I have previously found that the crime/fraud exception applies to communications between American Honda and its counsel on matters relating to the subject of gratuities during the period from 1979 to March, 1993, when Judge McAuliffe

I.

One preliminary matter must be addressed. The memoranda in question have been submitted to me for *ex parte* review and have not been disclosed to other counsel. American Honda therefore has requested that I not divulge their contents in writing this opinion. American Honda's concern is understandable, and, on its face, the request appears reasonable. However, there are two countervailing considerations. First, my opinion must set forth the bases of my decision with sufficient particularity so that, in the event of any appeal or other appellate review, plaintiffs are given a fair opportunity to argue why they believe I was correct. Second, I have identified two occasions on which Mr. Gargiulo's memoranda reflect that a different impression on a material matter was conveyed to the prosecutors in New Hampshire than has been given to the Court by American Honda during the course of the MDL proceedings. Lead counsel for American Honda in these proceedings were not representing American Honda during the proffer sessions, and I do not suggest they have been guilty of any improper conduct. I might also be incorrect in perceiving the contradictions I have observed. However, I have a duty to ensure the integrity of these proceedings and, in my judgment,

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referred the allegations in the *Nault* litigation to the U.S. Attorney's Office in New Hampshire. This finding was affirmed by Judge Murnaghan when American Honda sought a writ of mandamus in the Fourth Circuit preventing the disclosure of those communications.

adherence to that duty requires me to disclose the apparent contradictions so that their significance can be debated through the adversary process.

It is with these competing considerations in mind that I have written this opinion. In order to preserve the practical effectiveness of any appellate remedy American Honda might wish to pursue, I have attempted not to disclose any privileged matter unnecessary to my ruling. On the other hand, on several occasions I have quoted directly from the memoranda where I have concluded that disclosure is required for effective and fair adjudication of the issues presented.[2]

II.

I will first describe generally what happened during the proffer sessions. They were held on the afternoon of October 6, 1993, beginning at 2:00 p.m., and on October 8, 1993, beginning at 9:00 a.m.

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[2] I also note that although Mr. Gargiulo's memoranda are themselves privileged and constitute work product (subject, of course, to the crime/fraud exception), what occurred during the course of the proffer sessions themselves is not. Therefore, describing what was said during the sessions does not itself disclose privileged information. That said, I recognize the delicacy of the situation since my descriptions are derived from the Gargiulo memoranda. I know of no practical alternative, however. American Honda's suggestion that written questions be propounded to Michael Connolly, the Assistant United States Attorney in charge of the New Hampshire prosecution, to learn what was said during the sessions is not a feasible one.

Present on the first day were Mr. Gargiulo, Steve Gordon, and Andy Volinsky, all of whom were representing American Honda; Assistant United States Attorney Michael Connolly; and John Engelhoff, an agent with the FBI.[3] The meeting began with a discussion of various procedural issues. Mr. Gordon then made an opening presentation. That presentation is described in greater detail in Section III(A) of this opinion because it bears directly upon the crime/fraud ruling I am making. At 3:15 Mr. Gordon turned over a "factual proffer" and asked Mr. Connolly to read it. Mr. Gargiulo and Mr. Gordon "stepped out of the room to allow him to absorb it."

Upon their return, Mr. Gargiulo and Mr. Gordon reviewed with Mr. Connolly "the Town and Country package" and "the Barry Alexander handwritten memo." I will provide no further description of these conversations since they are not immediately germane to my decision. Discussion then turned to other routine procedural issues such as the acceptance of grand jury subpoenas, the representation of corporate employees by outside counsel, and the attendance of corporate counsel during non-grand jury interviews.

A review of the *Nault* case ensued. This discussion included the role said by Mr. Gargiulo and Mr. Gordon to

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[3] For ease of reference, when referring collectively to the American Honda representatives present at the meetings, I will say "Mr. Gargiulo and Mr. Gordon" since it does not appear that Mr. Volinsky – except on one isolated occasion – had a speaking part. Likewise, I will refer to all of the government representatives present at the meetings as "the prosecutors."

have been played over the years by Lyon & Lyon with American Honda. That portion of the discussion is quoted in Section IV(A) of this opinion.

As the afternoon was drawing to a close, talk turned to scheduling another session for October 8th. Mr. Connolly then mentioned that a venue issue might exist, indicating (quite understandably) that he desired to keep the case in New Hampshire. Various occurrences that might be considered to constitute "overt acts" in New Hampshire were then discussed, and Mr. Gargiulo and Mr. Gordon indicated that they would further investigate some of the occurrences.

The October 8th session was attended by the same persons who attended the October 6th meeting with the addition of another FBI agent and, sporadically, the Acting United States Attorney and the chief of the office's criminal division. The meeting began with some preliminary give-and-take. Mr. Connolly is reported to have said "he really had five prosecutors working on this case, meaning our [American Honda's] team and his team." Mr. Connolly also is reported to have "alluded to his difficulty in seeing a corporate benefit to the company" and to have asked "if, based on what [Honda representatives] had told him, that the management of the company had effectively been cleaned out as it pertained to these wrongdoers, . . . why would you indict the company if you've already gutted the management[?]" After the initial conversations, venue issues were again explored.

Discussion then turned to the credibility of certain witnesses or potential witnesses (some of whom had been speaking with the U.S. Attorney's Office). This discussion

(plus a further discussion of venue issues that occurred after the chief of the criminal division came into the room) took the rest of the morning.[4]

There was a working lunch during which an investigation of the sales training program funded by Honda dealers (apparently relevant to venue issues) was discussed. There was then an extensive discussion about the credibility of other potential witnesses, and "letters of intent" relating to the award of dealerships were mentioned. During the course of that discussion, Mr. Gargiulo and Mr. Gordon made a representation that appears to be contradictory to arguments made by American Honda during the MDL proceedings. The portion of the October 8th memorandum reflecting this representation is quoted in section IV(B) of this opinion.

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[4] Mr. Gargiulo and Mr. Gordon attacked the credibility of some of the witnesses. One of those witnesses was David Katarski, a disgruntled Honda dealer. For reasons discussed in section III(B) of this opinion, I believe the fact that they did so is relevant to the issues here presented (whether or not Mr. Katarski ultimately is found to be a truthful witness). I have therefore disclosed Mr. Katarski's identity in this opinion. However, I will not disclose the identity of any of the other witnesses whose credibility was attacked by Mr. Gargiulo and Mr. Gordon during the proffer sessions. I note, however, that my self-imposed restraint may hamper plaintiffs in defending my ruling on appeal, since a decision to attack the credibility of persons who American Honda had reason to know were telling the truth would adversely reflect upon the company's good faith. If plaintiffs knew the identity of witnesses challenged by Mr. Gargiulo and Mr. Gordon, they could make an assessment as to whether any of the witnesses fall within this category. Because I am not privy to all the facts that have been developed during discovery, I cannot do so.

After some more discussion about the credibility of witnesses, the conversation again focused upon letters of intent and allocations. After Mr. Connolly had compiled a "target list," the meeting closed with a discussion about Mr. Connolly's concern that American Honda "give him as much help to put this case together as quickly as possible so that he can keep it in New Hampshire."[5]

III.

A.

I will now set forth in greater detail the discussion that occurred near the start of the October 6th meeting concerning the nature of the investigation that American Honda and its outside counsel were conducting.

> Steve then went into a generalized outline of the process that we had used in investigating the facts that we felt that we were going to present to him in the proffer: how we conducted numerous interviews; how the company was totally cooperative in its interest in allowing us to get to the bottom of some of the rumors and allegations that had been heard emanating from the *Nault* case; and simply demonstrated to him

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[5] I want to emphasize that by quoting this language I am not criticizing Mr. Connolly for wanting to keep the case in New Hampshire. The important point is that Mr. Connolly was relying upon what was being told to him by Mr. Gargiulo and Mr. Gordon not only about facts relating to venue (as to which I have no reason to believe that any misrepresentations were made) but also about the adequacy and good faith of American Honda's general investigation (as to which I find there is *prima facie* evidence that misrepresentations were made).

that this was a full-blown, good faith effort by the company to explore the references that have been made either in the press or in litigation involving corrupt practices by Honda employees.

Steve then, in a general way, went into the variety of changes that occurred at the company. Specifically, we discussed at some length the efforts made to change the awarding of LOIs and dealerships, the change in that area by creating a committee, indicating that Mark was involved as a member of that committee, demonstrating that people outside the normal chain of command on the management side would not have the final say and that a due diligence, so to speak, would be done concerning the application process by the committee, who would have the final say as to who would get the LOI or dealership. We also discussed the fact that there had been dramatic changes in personnel, removal of people such as Cardiges and others who were implicated in the wrongdoing, which was another example of the company trying to deal with this problem in as forthright a way as possible.

We explained that our goal was to take our investigative effort and organize it into a form that would be similar to a prosecution memo that Connolly would be familiar with as a federal prosecutor. We represented that the factual proffer we were going to make, in our opinion, represented a prosecutable case against numerous individuals, some of whom were former employees of the company.

After a short discussion about civil suits American Honda anticipated would be filed and the execution of

formal proffer documents, Mr. Gordon presented Mr. Connolly with a "factual proffer consisting of six or seven pages which we put together."

B.

American Honda has represented to the Court that Mr. Gargiulo and Mr. Gordon recall that the "factual proffer" they provided to Mr. Connolly was a series of "executive summaries" they had removed from more voluminous documents that had been prepared and sent to America Honda by a disgruntled Honda dealer, David Katerski, and his counsel. For reasons I will state in section III(C) of this opinion, I find that there is language in both the October 6th and the October 8th memoranda that draws the accuracy of Mr. Gargiulo's and Mr. Gordon's recollections into question. Indeed, I find that the memoranda themselves constitute *prima facie* evidence that a "factual proffer," different from the Katarski summaries, was provided to Mr. Connolly, and that the memoranda should be disclosed if for no other reason than to allow this issue to be explored through the depositions of Mr. Gargiulo, Mr. Gordon, Mr. Volinsky, Mark Brooks (American Honda's in-house counsel who apparently served as the company's liaison in connection with the proffer sessions), and anyone else (including Mr. Connolly, if possible) with knowledge of facts that might shed some light on the nature of the proffer.

Assuming, however, that the recollections of Mr. Gargiulo and Mr. Gordon are correct, the crime/fraud exception nevertheless applies. Whatever else the October 6th and October 8th memoranda may say, it seems clear in

context that the factual proffer provided to Mr. Connolly (1) was represented by Mr. Gargiulo and Mr. Gordon to be the work product of "we," ostensibly American Honda's outside counsel, and (2) had purportedly been prepared after an investigation described by Mr. Gordon "as a full-blown, good faith effort by the company to explore the references that have been made either in the press or in litigation involving corrupt practices by Honda employees." A series of summaries not prepared by American Honda or its counsel, but instead by a complaining dealer, self-evidently fits neither of these descriptions. Thus, if Mr. Gargiulo and Mr. Gordon presented such summaries as their own "factual proffer," this in and of itself constitutes *prima facie* evidence that they were involved in a plan to mislead the prosecutors in New Hampshire.

Perhaps the deception was implicit rather than express, but it was nonetheless material. Mr. Gargiulo and Mr. Gordon were attempting to persuade Mr. Connolly that American Honda was innocent of any wrongdoing. In order to be successful, they had to demonstrate that the company was ignorant of the crimes committed by its former executives who were under investigation. It was to that end that they provided the factual proffer to Mr. Connolly, leading him to believe they were showing him the results of a responsible, thorough outside investigation in which American Honda had been "totally cooperative." If, in fact (as Mr. Gargiulo and Mr. Gordon recall), Mr. Connolly was shown the Katarski summaries, the presentation was itself an act of concealment. Having been prepared by a corporate outsider, the summaries could not possibly reflect what they were proffered to

show – the extent of knowledge within American Honda. Moreover, at a later point during the proffer sessions, Mr. Gargiulo and Mr. Gordon attacked the credibility of the very dealer whose summaries they now say they proclaimed as the results of their own investigation. Mr. Connolly, of course, was unaware that they were thereby undermining the reliability of their factual proffer since he did not know that Mr. Katarski was the source of the proffer.

The deceit thus practiced by Mr. Gargiulo and Mr. Gordon (if their recollections are correct) goes to the very heart of the matters at issue. In seeking to have me review the Gargiulo memoranda, plaintiffs made a simple three-part argument as to why the crime/fraud exception applies to the proffer materials.[6] First, according to plaintiffs, knowledge about the corrupt activities of Honda executives was widespread within the company, including upper levels of management; second, the indictments returned against former Honda executives named American Honda as a victim of the defendants' illegal conduct; third, American Honda must therefore have concealed from the prosecutors the extent of the company's knowledge.

The two premises of this argument are sound. Without regard to the Gargiulo memoranda, the record establishes *prima facie* evidence (which, of course, is all that is

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[6] In fact, plaintiffs argued that I should order production of the Gargiulo memoranda without reviewing them myself in light of the strong *prima facie* evidence they had already presented. I chose the more cautious route of seeing the contents of the memoranda before ordering their disclosure.

required for present purposes) that members of American Honda's upper management did have knowledge of (or at least wilfully blinded themselves to) allegations of bribe-taking by Honda executives. Likewise, the indictment in New Hampshire speaks for itself in naming American Honda as a victim.[7] The Gargiulo memoranda now seem to provide direct evidence corroborating what before was only an inference from these two premises. If

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[7] In arguing against the present motion to compel, American Honda has suggested that it was considered to be a victim in the criminal prosecutions in a relatively narrow sense unrelated to the allocation claims asserted by plaintiffs in these proceedings. Prior to this time it has not drawn any such distinction. Rather, it has attempted to put its "victim" status in the criminal proceedings to good advantage in various contexts. In any event, there is no indication that Mr. Gargiulo and Mr. Gordon made any such distinction in their presentations to the prosecutors in New Hampshire. Their effort was a general one to persuade the prosecutors that the company had been victimized. Nor did the prosecutors make any narrow distinctions. The indictment in *United States v. Billmyer* broadly charged that the defendants had "devised and intended to devise a scheme to defraud American Honda and its dealers" against the background of allegations relating to American Honda's conflict of interest policy and its policy regarding the award of new dealerships. If (as plaintiffs contend) the written policies were merely empty verbiage because of widespread knowledge about the illegal conduct among members of the upper management of American Honda (and/or Honda, Ltd., American Honda's corporate parent), the factual underpinnings of the prosecutions would have been brought into question. Mr. Connolly recognized as much when he turned over as *Brady* material to counsel for one of the indicted former executives a letter from a lawyer for other former and current Honda employees describing a meeting attended by a high-ranking Honda official at which a dealer was "shaken down" by an American Honda executive.

the recollections of Mr. Gargiulo and Mr. Gordon are correct, the memoranda demonstrate that, during the proffer session, American Honda (through counsel) concealed the extent of its knowledge by portraying as "a factual proffer . . . [resulting from] a full-blown good faith effort by the company [to uncover wrongdoing]" summaries of an entirely different nature.[8]

C.

For the reasons just stated, the context in which the factual proffer was made strongly suggests that Mr. Connolly was being shown a document that Mr. Gargiulo and Mr. Gordon themselves had prepared after consultation with their client. If that is so, Mr. Gargiulo and Mr. Gordon are mistaken in their recollections that their factual proffer consisted of pages from the Katarski summaries. Other portions of the October 6th and October 8th memoranda further draw the accuracy of their recollections into question.[9]

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[8] American Honda has designated certain material as opinion work product that should not be disclosed even if the remaining contents of the memoranda are disclosed. American Honda has been quite responsible in selecting what it deems to constitute opinion work product, and I am satisfied (with several exceptions) that "extraordinary circumstances" do not require the disclosure of the designated material. *See Doe v. United States*, 662 F.2d 1073, 1079-80 (4th Cir. 1981). The exceptions (which are quoted in section III(C)) are directly relevant to the question of the accuracy of Mr. Gargiulo's and Mr. Gordon's recollections.

[9] The Katarski summaries substantially exceeded six or seven pages in number. Testing the accuracy of the recollections of Mr. Gargiulo and Mr. Gordon is made somewhat difficult by

First, before providing the proffer, Mr. Gargiulo and Mr. Gordon required Mr. Connolly to sign a "nonwaiver of attorney-client privilege agreement." Having been received by American Honda from a third party, the Katarski summaries clearly were not privileged, as American Honda itself has acknowledged by producing them to plaintiffs in the MDL proceedings without asserting any claim of privilege. Thus, if Mr. Gargiulo and Mr. Gordon's recollections are correct, they committed another act of implied deceit by suggesting to Mr. Connolly, when requiring him to sign a nonwaiver agreement, that what he was being shown was privileged.[10]

Second, as quoted above, the October 6th memorandum states that Mr. Gargiulo and Mr. Gordon "explained that our goal was to take our investigative effort and organize it into a form that would be similar to a prosecution memo that Connolly would be familiar with as a federal prosecutor." American Honda contends that this was a reference to a memorandum that was to be prepared after the proffer meetings but never was. An arguably more credible reading is that the factual proffer to be presented on October 6 constituted the fulfillment of Mr. Gargiulo's and Mr. Gordon's "goal" and that the proffer was itself "similar to a prosecution memo that Connolly

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the fact they do not remember which of the summaries they presented to Mr. Connolly as the six or seven page "factual proffer." It is surprising that, as experienced lawyers, they did not keep a written record of a matter of such importance.

[10] In contrast, if the factual proffer presented to Mr. Connolly was the work product of Mr. Gargiulo and Mr. Gordon, requiring Mr. Connolly to sign a nonwaiver agreement would have been entirely appropriate.

would be familiar with." This reading is supported by the fact that the explanation of the "goal" immediately preceded presentation of the proffer.

Third, the October 6th memorandum contains the following statements as to what occurred after Mr. Gordon had presented Mr. Connolly with the factual proffer:

> At 3:15 p.m. (we started at 2:00), Steve turned over for the first time the factual proffer consisting of six or seven pages which we put together, and asked him to read it. In fact, I think we stepped out of the room to allow him to absorb it.
>
> We then began reviewing the Town and Country package. We earlier had explained to him that we were going to present to him a three or four page summary with specific facts supported by exhibits which would demonstrate, in our opinion, a prosecutable case, but that we would take the factual summary, since it was really our work product, and we felt that he would have to come to his own conclusions from the facts and evidence we were going to leave with him, which would be the documentary evidence.

American Honda contends that the "factual summary" mentioned in this portion of the memorandum was a reference to the "prosecution memo" that Mr. Gargiulo and Mr. Gordon had planned to prepare and submit to Mr. Connolly after the meeting but never did. Perhaps this contention is accurate.[11] Again, however, another

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[11] I note, however, that American Honda's interpretation is somewhat awkward since it means that Mr. Gargiulo, in describing a "factual summary" that never came into existence,

reading is possible. American Honda admits (as the language of and verb tenses used in the October 6th memorandum make clear) that the "earlier" discussion, in which Mr. Gargiulo and Mr. Gordon told Mr. Connolly they would be "present[ing] to him a three or four page factual summary with specific facts supported by exhibits which would demonstrate, in our opinion, a prosecutable case," occurred some time before the October 6th proffer session. (Transcript of April 24, 1998 hearing). It may very well be that what, prior to the meeting, Mr. Gargiulo and Mr. Gordon had expected to be a "three or four page summary" turned into "the factual proffer consisting of six or seven pages" that was turned over to Mr. Connolly. This reading is at least as plausible as the interpretation given by American Honda. Indeed, it seems to bring coherence to this portion of the memorandum. "Earlier," i.e. prior to the proffer session, Mr. Gargiulo and Mr. Gordon had told Mr. Connolly that they would be providing him with a factual summary or proffer. They also told him that since this summary "was really . . . work product," they "would take" it with them after the proffer session was over. However, they "were going to leave with him . . . documentary evidence" from which "he would have to come to his own conclusions." There is no question that Mr. Gargiulo and Mr. Gordon did, in fact, leave documentary exhibits with Mr. Connolly for him to review after the meetings.

Fourth, the sentence immediately following the portion of the October 6th memorandum just quoted states:

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said "it *was* really our work product," not that "it *will be* our work product."

"[k]eep in mind that before going to the meeting, we agreed that all of the exhibits contained in our notebook were discoverable documents and not subject to any privilege, so in our opinion we really are not giving him anything more than what he would have been entitled to under the outstanding subpoena." This sentence, when considered in its context, appears to draw an implicit distinction between the "factual summary" and the unprivileged "exhibits contained in our notebook." This distinction does not fit with the factual summary having been the Katarski summaries since, as stated above, the Katarski summaries clearly were not privileged.

Fifth, when recording his impressions in the early stages of the October 8th meeting concerning the prosecutors' reaction to the October 6th presentation, Mr. Gargiulo stated "they were very much impressed with the corroborative physical evidence, and in fact it struck me that we told them that we would do this as if it were a prosecution memo, and I think they never expected the tight package that we put together for them." There are two possibly significant aspects of this observation. First, although the use of the words "would do this" makes the language unclear, taken as a whole this passage may confirm that the "prosecution-like memo" was the actual written proffer presented on October 6. Second, the Katarski summaries do not meet the description of "a tight package."

Finally, the October 8th memorandum records that near the end of that day's meeting "Steve [Gordon] went through the Katarsky [sic] information." Of course, it is possible that "the Katarski information" was reviewed on two separate occasions, or that different aspects of the

"Katarski information" were reviewed at different times. However, it is also possible that with the passage of time Mr. Gargiulo's and Mr. Gordon's memories have become hazy, and that they have misrecollected presenting the Katarski summaries as their factual proffer on October 6th when, in actuality, the summaries were discussed on October 8th. This, like the other questions raised by the language of the two Gargiulo memoranda, is an appropriate matter for further inquiry.

IV.

The issue remaining to be considered concerns what I perceive as contradictions between the impressions conveyed by Mr. Gargiulo and Mr. Gordon to the prosecutors in New Hampshire and impressions conveyed by American Honda to the Court in these proceedings.

The first apparent contradiction relates to the role played by Lyon & Lyon with American Honda over the years. At one point during the October 6th meeting, the discussion focused upon that question. The memorandum states as follows:

> We then began reviewing the *Nault* case, and I think this was in response to Connolly's request about how long we had been in the case and what our role had been and whether we had ever represented American Honda prior to the *Nault* litigation, all of which we answered in the negative. And again this was also prompted by his comment that the government had "concerns" about Lyon & Lyon's role in the *Nault* litigation, and with that Steve began explaining, beginning, I think, with February of 1993, the

hearing before Judge McAuliffe in which McNamara and McCarthy both testified concerning whether or not the attorneys for the company failed to properly disclose information involving the payment of bribes and gratuities to company employees as alleged by Budnick. Steve explained that Budnick's position was that he had told McCarthy and that McCarthy knew and certain answers to interrogatories were filed; and how Mark came out to the hearing and recognizing that Budnick was the company's primary witness in the *Nault* litigation, was dismayed to see Lyon & Lyon destroy Budnick's credibility before the court in order to save McCarthy. We then reviewed how that totally changed the balance of the case, which we felt the company had a very defensible claim until this problem arose involving the McCarthy issue. *That led to a discussion about Lyon & Lyon's outside counsel's role to the company, and we talked a little about Bud Smoot and how he started with the company in the 1970's when it was a motorcycle company and eventually ended up on the Board of Directors and actually came in-house for a while and how, as a result of the Lyon & Lyon relationship, that the institutional memory of the company's problems and successes really resided with the law firm because, traditionally, the top Japanese management of the company was not there for 20-30 years at a time, and they rotated out maybe in the five to eight year range, so that nobody was left within the company who really had a historical perspective on problems that may have arisen over the years within the company but for Lyon & Lyon and Bud Smoot. Connolly was . . . [apprised] that there was not a strong general counsel's office in the company and that Lyon & Lyon literally had authority to deal with*

> *line personnel people in the field could call Lyon & Lyon with the most insignificant of matters, and that their relationship was such that all dealer litigation and corporate litigation went directly to Lyon & Lyon and really was not handled or managed in-house at all.* (emphasis added).

What apparently was said to Mr. Connolly stands in contrast to what has been said by American Honda in the MDL proceedings. Here, although American Honda and Lyon & Lyon have both acknowledged the close relationship the law firm has had with the company, they have emphasized that Lyon & Lyon attorneys were outside counsel to whom matters were only occasionally referred by corporate managers. For example, in an affidavit he submitted in opposition to plaintiffs' motion to set aside privilege, Roland Smoot (the partner of Lyon & Lyon who served for years as a member of American Honda's board of directors) stated: "[h]owever, contrary to the Plaintiffs' allegations, it was my understanding that investigations of Honda employees normally were referred to American Honda's Human Resources Department. It also was my understanding that it was the exception, rather than the rule, that investigations of Honda employees were referred to Lyon & Lyon." Similarly, in its memorandum in opposition to the same motion, American Honda stated in disputing a claim made by plaintiffs that Lyon & Lyon had acted as a "gratuity monitor" for the company: "[t]his testimony that, where appropriate the company's outside counsel was consulted or asked to investigate allegations of violations of the policy, is a far cry from evidence that Lyon & Lyon was charged with general managerial oversight for enforcing the conflict of interest policy."

I recognize that one of the arts of lawyering is to advocate different positions from the same set of facts. I also recognize that fine distinctions perhaps can be drawn between what apparently was said to the prosecutors in New Hampshire and what has been sworn to and argued before this court. Justification may lie in the brush strokes. However, what is of concern to me is that, in the final analysis, entirely different impressions have been given, depending upon the identity of the persons to whom representations have been made. Simply put, it is quite difficult to reconcile what has been represented to this Court in these proceedings with the propositions that "there was not a strong general counsel's office in the company and that Lyon & Lyon literally had authority to deal with line personnel, people in the field could call Lyon & Lyon with the most insignificant of matters, and that their relationship was such that all dealer litigation and corporate litigation went directly to Lyon & Lyon and really was not handled or managed in-house at all."

B.

The second apparent contradiction between what was communicated to the prosecutors in New Hampshire and what has been argued to this Court relates to whether dealer "points" were established at locations where they were not justified by market data. This quotation comes from a portion of the October 8th Memorandum:

> We reiterated how the company was a victim on this and how the company had not benefited from any of this conduct but in fact was hurt by virtue of these points being opened in areas

where they really were unnecessary, in some cases.

This representation, by counsel for American Honda, that certain points "really were unnecessary," appears inconsistent with the position taken by American Honda at various times during oral arguments in the MDL proceedings. On those occasions, counsel for American Honda have attacked, as lacking in factual basis, claims made by the plaintiffs that dealerships were awarded where they were not justified by market data. No particular dealer points were being discussed during the arguments, and it may be that the two different positions taken by American Honda, which appear inconsistent in the abstract, can be reconciled by reference to particular points. Thus, it may be that American Honda eventually will concede in these proceedings that at least some awarded points were not economically justified. Absent such a concession, however, the contradiction seems manifest.

C.

These two incidents of apparent contradictions present a different analytical problem than does the apparent misrepresentation about the factual proffer given to the prosecutors. Ironically, according to plaintiffs' contentions and claims, what was represented to the prosecutors about Lyon & Lyon and dealer points was not misleading at all. To the contrary, it is plaintiffs who have been arguing in the MDL proceedings that Lyon & Lyon "had authority to deal with line personnel," that Lyon & Lyon was American Honda's "institutional memory," and that

dealer points were awarded where they "were unnecessary."

Though the problem is thus different, the proper remedy is clearly the same: disclosure of the memoranda reflecting what the prosecutors were told. It would be intolerable to permit American Honda to convey one impression to avoid criminal prosecution and to convey another impression to avoid civil liability without at least being asked to explain the apparent inconsistencies in its positions.

I will enter an order herewith granting plaintiffs' motion. I will temporarily stay the effect of the order to give American Honda the opportunity to seek a writ of mandamus (or other appellate relief) should it choose to do so.[12]

June 3, 1998
Date

/s/ J. Frederick Motz
J. Frederick Motz
United States District Judge

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[12] I am staying the effect of my order out of respect for the attorney/client privilege and the work product doctrine, not because I believe that the question of whether the memoranda should be produced is a close one. I do not believe it is.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE: AMERICAN HONDA MOTOR COMPANY, INC. DEALER RELATIONS LITIGATION	* * * *	MDL Case No. 1069

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ORDER

For the reasons stated in the Opinion entered herewith, it is, this 3rd day of June 1998

ORDERED

1. Plaintiffs' motion to compel proffer documents is granted;

2. American Honda shall produce to plaintiffs, on June 8, 1998 at 10:00 a.m. E.D.T., (1) the two memoranda to file prepared by Robert Gargiulo dated October 6, 1998 and October 8, 1998 concerning the proffer meetings with federal prosecutors and investigative agents in New Hampshire, and (2) all *ex parte* submissions that have been made to the Court in connection with this matter;

3. American Honda may redact from the copies of the memoranda it produces the material it designated as attorney opinion work product in its submissions to the Court, except those portions quoted in the Opinion entered herewith; and

4. This Order will be stayed until June 10, 1998 at 5:00 p.m. E.D.T. in the event that American Honda has sought relief from the Order in the United States Court of

Appeals for the Fourth Circuit on or before June 8, 1998 at 10:00 a.m. E.D.T.

/s/ J. Frederick Motz
J. Frederick Motz
United States District Judge